Supreme Court, U.S.
FILED

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No._____

In the

Supreme Court of the United States

LARRY LEAKE, in his official capacity as Chairman of the North Carolina State Board of Elections; GENEVIEVE C. SIMS, in her official capacity as Secretary of the State Board of Elections; ROBERT CORDLE, in his official capacity as member of the State Board of Elections; LORRAINE G. SHINN, in her official capacity as member of the State Board of Elections; CHARLES WINFREE, in his official capacity as member of the State Board of Elections; ROBERT F. JOHNSON, in his official capacity as District Attorney for the North Carolina Prosecutorial District 15A; ROY COOPER, in his official capacity as the North Carolina Attorney General,

Petitioners,

v.

NORTH CAROLINA RIGHT TO LIFE, INCORPORATED; NORTH CAROLINA RIGHT TO LIFE POLITICAL ACTION COMMITTEE; NORTH CAROLINA RIGHT TO LIFE COMMITTEE FUND FOR INDEPENDENT POLITICAL EXPENDITURES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER ONE OF NORTH CAROLINA'S TESTS FOR DETERMINING WHETHER A COMMUNICATION IS ELECTORAL ADVOCACY IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD ON THE GROUND THAT IT IMPERMISSIBLY REGULATES "ISSUE ADVOCACY."

II. WHETHER THE STATUTORY REBUTTABLE PRESUMPTION USED FOR IDENTIFYING ENTITIES THAT MAY HAVE A MAJOR PURPOSE OF SUPPORTING OR OPPOSING CLEARLY IDENTIFIED CANDIDATES IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

III. WHETHER NORTH CAROLINA'S CONTRIBUTION LIMIT OF $4,000 PER PRIMARY OR ELECTION MAY BE CONSTITUTIONALLY APPLIED TO A POLITICAL COMMITTEE THAT STATES IT INTENDS TO MAKE ONLY INDEPENDENT EXPENDITURES WHEN AFFILIATED POLITICAL COMMITTEES WITH THE SAME OFFICERS AND MEMBERS MAKE

CONTRIBUTIONS TO POLITICAL CAMPAIGNS AND ITS PARENT CORPORATION MAKES CONTRIBUTIONS FROM THE CORPORATE TREASURY TO POLITICAL CAMPAIGNS.

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Larry Leake, Genevieve C. Sims, Robert Cordle, Lorraine G. Shinn, and Charles Winfree, in their official capacities as Chairman, Secretary, and members of the North Carolina State Board of Elections, Robert F. Johnson, in his official capacity as District Attorney for the North Carolina Prosecutorial District 15A, and Roy Cooper, in his official capacity as Attorney General of North Carolina, respectfully petition for writ of certiorari to review the judgment of the United State Court of Appeals for the Fourth Circuit, vacate the decision below, and remand the case for further consideration by the Fourth Circuit in light of the intervening decision of this Court in *McConnell v. FEC*, No. 02-1674 (U.S. Dec. 10, 2003).

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-43a) is reported at *North Carolina Right to Life, Inc. v. Leake*, 344 F.3d 418 (4th Cir. 2003). The opinions of the district court are not reported. (App. 49a-97a)

JURISDICTION

The Court of Appeals entered its judgment on September 23, 2003 (App. 45a-47a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This cases involves the First Amendment to the United States Constitution (App. 99a), as applied to the states through the Fourteenth Amendment, and N.C. GEN. STAT. §§ 163-278.6(14), -278.13, and -278.14A(a)(2) (App. 101a-109a).

STATEMENT OF THE CASE

A. Proceedings Below

Respondents brought this action on November 30, 1999, in the United States District Court for the Eastern District of North Carolina challenging the constitutionality under the First Amendment of several North Carolina General Statutes: N.C. GEN. STAT. §§ 163-278.6(14) (defines the term "political committee"), 163-278.13 (limits contributions to candidates and political committees to $4,000 per primary or general election), and 163-278.14A(a)(2) (establishes means of proving that a communication constituted electoral advocacy triggering disclosure and other requirements). The district court entered its order on October 24, 2001, granting summary judgment to respondents and determining that N.C. GEN. STAT. § 163-278.14A(a)(2) is unconstitutionally overbroad, thus N.C. GEN. STAT. § 163-278.6(14) is also overbroad. The court determined that N.C. GEN. STAT. § 163-278.13 could not be constitutionally applied to North Carolina Right to Life Committee Fund for Independent Political Expenditures (NCRL-FIPE) "and other political committees that only make independent expenditures." (App. 78a) On August 8, 2002, the district court amended its

order by clarifying that N.C. GEN. STAT. § 163-278.14A(a)(2) is severable from the remainder of N.C. GEN. STAT. § 163-278.14A and that N.C. GEN. STAT. § 163-278.6(14) is unconstitutional only to the extent that it incorporates the test of electoral advocacy in N.C. GEN. STAT.§ 163-278.14A(a)(2). The court found that respondents' argument with respect to N.C. GEN. STAT. § 163-278.12A was moot.

Both sides appealed. The court of appeals affirmed in part and reversed in part. It first concluded that N.C. GEN. STAT. § 163-278.14A(a)(2) is unconstitutionally vague and overbroad under "a bright-line test for determining whether communications may constitutionally be regulated as electoral advocacy." 344 F.3d at 424 (citing *Buckley v. Valeo*, 424 U.S. 1, 43 (1976)). Judge Michael dissented, reasoning that the first sentence of the statute should be upheld as "an explicative definition of express advocacy that passes muster under *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*) and *Buckley v. Valeo*, 424 U.S. 1 (1976), but agreeing that the second sentence of the statute should be stricken. 344 F.3d at 436-37 (Michael, J. dissenting). Next, it reversed the district court on what it characterized as a "close question," concluding that the statutory rebuttable presumption used in determining whether a major purpose of an entity may be to support or oppose candidates in N.C. GEN. STAT. § 163-278.6(14) is vague and overbroad under the First Amendment. 344 F.3d at 429. It also concluded that the contribution limit of $4,000 per election is substantially overbroad and may not be constitutionally applied to a political committee formed by North Carolina Right to Life, Inc.

("NCRL") with the stated intent to make only independent expenditures. 344 F.3d at 434. Finally, the court of appeals concluded that NCRL's challenge to N.C. GEN. STAT. § 163-278.12A was moot, 344 F.3d at 434-35, although Judge Michael wrote separately to concur in the result on that issue. *Id.* at 437.

B. Factual Background

Respondents are North Carolina Right to Life, Inc., a non-profit membership corporation incorporated under North Carolina law, and North Carolina Right to Life Political Action Committee (NCRLPAC), a longstanding political committee registered in North Carolina as a state political committee for which NCRL serves as the parent entity pursuant to N.C. GEN. STAT. § 163-278.19(b) (2003). In 1999, NCRL resolved "to form a separate segregated fund of [NCRL] to be known as North Carolina Right to Life Committee Fund for Independent Political Expenditures (NCRLC-FIPE) for the sole purpose of making independent expenditures in North Carolina state elections in order to further the goals and purposes of North Carolina Right to Life, Inc." (Complaint, Ex. E) North Carolina law does not distinguish among political committees that make only contributions, those that make only independent expenditures, and those that make both. Nevertheless, NCRLC-FIPE represents that it intends only to make independent expenditures.

In *North Carolina Right to Life, Inc. v. Bartlett,* 168 F.3d 705, 708-09 (4th Cir.1999), *cert. denied*, 528 U.S. 1153, 120 S. Ct. 1156 (2000) (*NCRL I*), the activities of NCRL and NCRLPAC are described. The corporation maintained in that

case that it wished to make contributions and independent expenditures in support of political candidates directly from its corporate treasury without going through its political action committee. The Fourth Circuit held that North Carolina's prohibition against corporate contributions and expenditures in political campaigns could not be applied to NCRL under its interpretation of the decision in *MCFL*. North Carolina amended its statutes to conform to the Fourth Circuit's opinion in 1999, and now has an exception that allows NCRL-type entities to make contributions and expenditures in support of political candidates directly from its corporate treasury. *See* N.C. GEN. STAT. § 163-278.19(f) (2003). North Carolina has taken no action to change its statutes since this Court ruled that Congress may prohibit NCRL and similar non-profit corporations from making corporate contributions to federal campaigns. *Federal Election Comm'n v. Beaumont*, ___ U.S. ___ , 123 S. Ct. 2200 (2003).

Based on the results of the litigation brought by NCRL, and its representations in this case, it is a corporation that has made contributions and independent expenditures directly from its corporate funds in political campaigns for state offices and wishes to continue doing so. (Complaint pp. 31-32) NCRL may not make contributions to campaigns for federal offices from its corporate treasury, but may make independent expenditures. *Beaumont*, 123 S. Ct. at 2205 n.2. It has both state and federal political committees that can and do make contributions and expenditures to either state or federal political campaigns. In addition, NCRL has formed a third political committee that it intends will make only independent expenditures. These entities

have a history of the same PAC Directors, overlapping treasurers, the same president and the same membership base. (*See* Dep. Ex. 86 (App. 111a-113a)).

REASONS FOR GRANTING THE PETITION

Since the Fourth Circuit ruled in this case, this Court has issued its opinion in *McConnell v. FEC*, No. 02-1674 (U.S. Dec. 10, 2003). The *McConnell* decision, in upholding a variety of new provisions governing federal candidates, political parties and political committees, repudiates a rigid, bright-line distinction between express and issue advocacy, a "crabbed view of corruption, and particularly of the appearance of corruption," and a lack of deference to legislative expertise in the campaign finance arena that has permeated the decisions of many lower courts, including this one by the Fourth Circuit. Petitioners respectfully request that this Court, pursuant to its authority under 28 U.S.C. § 2106, grant this Petition, vacate the decision below, and remand the case to the Fourth Circuit for further consideration in light of the *McConnell* decision.[1] The *McConnell* decision casts doubt on whether the Fourth Circuit would reach the same judgment on all three of the questions presented.

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[1] This Court has frequently granted petitions, vacated the decision below, and remanded the case for consideration in light of an intervening decision of this Court when that decision "has cast doubt on the judgment rendered by a lower federal court." *See Lawrence v. Chater*, 516 U.S. 163, 180 (1996) (Scalia, J. dissenting), and cases cited therein.

I. THE FOURTH CIRCUIT USED A RIGID, BRIGHT-LINE STANDARD REJECTED IN *MCCONNELL* IN CONCLUDING THAT N.C. GEN. STAT. § 163-278.14A(a)(2) IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

After the Fourth Circuit found several provisions of North Carolina's campaign finance laws to be unconstitutional in *NCRL I*, the General Assembly promptly responded by adopting new legislation that sought to reconcile competing views on the proper scope of campaign finance regulation, but that would, at the same time, meet constitutional requirements as articulated by this Court in *MCFL* and *Buckley*, as construed by the Fourth Circuit. The phrase "to support or oppose the nomination or election of one or more clearly identified candidates" was used multiple times in the revised statutes. *See, e.g.*, N.C. GEN. STAT. § 163-278.6(6) (2003) (definition of "contribution"); N.C. GEN. STAT. § 163-278.6(9a) (2003) (definition of "independent expenditure"); N.C. GEN. STAT. § 163-278.6(14)d (2003) (definition of "political committee"); and N.C. GEN. STAT. § 163-278.39(a)(5) (2003) (disclosure requirements for print media advertisements). N.C. GEN. STAT. § 163-278.14A(a) sets forth the "means, but not necessarily the exclusive or conclusive means, of proving that an individual or other entity acted 'to support or oppose the nomination or election of one or more clearly identified candidates.'" Subsection (a) provides two possible means of proving that an action was taken to support or oppose a clearly identified candidate:

(1) Evidence of financial sponsorship of communications to the general public that use phrases such as "vote for", "reelect", "support", "cast your ballot for", "(name of candidate) for (name of office)", "(name of candidate) in (year)", "vote against", "defeat", "reject", "vote pro-(policy position)" or "vote anti-(policy position)" accompanied by a list of candidates clearly labeled "pro-(policy position)" or "anti-(policy position)", or communications of campaign words or slogans, such as posters, bumper stickers, advertisements, etc., which say "(name of candidate)'s the One", "(name of candidate) '98", "(name of candidate)!", or the names of two candidates joined by a hyphen or slash.

(2) Evidence of financial sponsorship of communications whose essential nature expresses electoral advocacy to the general public and goes beyond a mere discussion of public issues in that they direct voters to take some action to nominate, elect, or defeat a candidate in an election. If the course of action is unclear, contextual factors such as the language of the communication as a whole, the timing of the communication in relation to events of the day, the distribution of the communication to a significant number of registered voters for that candidate's election, and the cost of the

> communication may be considered in determining whether the action urged could only be interpreted by a reasonable person as advocating the nomination, election, or defeat of that candidate in that election.

The first provision, N.C. GEN. STAT. § 163-278.14A(a)(1), provides examples of words or phrases much like the "magic words" of *Buckley*. 424 U.S. at 44 n.52. The second test, while still limited to words of advocacy as required by the Fourth Circuit in *Federal Election Comm'n v. Christian Action Network, Inc.*, 110 F.3d 1049, 1052-55 (4th Cir. 1997) (*CAN II*), codified the less restrictive formulation used by this Court in *MCFL*. As Judge Michael explained in his dissent in this case, the first sentence of the second part is nothing more than an explication of *MCFL*. All three judges of the Fourth Circuit found fault with the second part of the test, which allows consideration of contextual factors if the action exhorted in the communication to the general public is unclear. However, these contextual factors are similar to the ones Congress used in defining an "electioneering communication" in Section 201 of the Bipartisan Campaign Reform Act of 2002 (BCRA). The definition, upheld in *McConnell*, establishes disclosure requirements and prohibitions on corporate and union funding for communications that are "broadcast," and "refer to a clearly identified candidate," made within a certain time period before a primary or general election, and is "targeted to the relevant electorate." 2 U.S.C.A. § 434 (f)(3)(A)(i) (Supp. 2003). The *McConnell* opinion definitively rejects the argument that "Congress cannot constitutionally require disclosure of, or

regulate expenditures for, 'electioneering communications' without making an exception for those 'communications' that do not meet *Buckley's* definition of express advocacy." *McConnell* slip op. at 83. This Court held "our decisions in *Buckley* and *MCFL* were specific to the statutory language before us; they in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech." *McConnell* slip op. at 84. This Court recognized that the distinction between express and "so-called" issue advocacy did not aid "the legislative effort to combat real or apparent corruption." *McConnell* slip op. at 87. Most pertinent to the issue here, the Court found that Congress could act to regulate "electioneering communication" that did not contain the "magic words" of express advocacy because "the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad" and "*Buckley*'s magic-word requirement is functionally meaningless." *McConnell*, slip op. at 86.

The Fourth Circuit, however, found North Carolina's statute to be overbroad because the court rigidly adhered to the doctrine that "[t]he Supreme Court adopted in *Buckley* is a bright-line test for determining whether communications may constitutionally be regulated as electoral advocacy." 344 F.3d at 424. The majority even opposed the first sentence of N.C. GEN. STAT. § 163-278.14A(a)(2) because it "impermissibly dilutes the *Buckley* standard by allowing regulation of communications which do not contain explicit words of advocacy." 344 F.3d at 425 n.2. It found the second sentence to be vague and overbroad because it allows consideration of contextual factors such as "the

language of the communication as a whole, the timing of the communication in relation to events of the day, the distribution of the communication to a significant number of registered voters for that candidate's election, and the cost of the communication." *Id.* at 423. These contextual factors are very similar to those used by Congress in BCRA – the timing of the communication, the targeted audience, and reference to a clearly identified candidate. Surely North Carolina's limited test of an electioneering communication will be deemed constitutional if reviewed by the Fourth Circuit with the guidance of *McConnell*.

II. THE STATUTORY REBUTTABLE PRESUMPTION USED FOR IDENTIFYING ENTITIES THAT MAY HAVE A MAJOR PURPOSE OF SUPPORTING OR OPPOSING CLEARLY IDENTIFIED CANDIDATES IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

The General Assembly of North Carolina, in rewriting its definition of a political committee after *NCRL I*, drew upon the special expertise of its members and provided specificity to guide candidates, corporations, political parties and others on what constitutes a political committee. The Fourth Circuit, while it considered the constitutionality of the General Assembly's enactment to be a "close question," 344 F.3d at 430, nevertheless failed to accord any deference in this area where legislators utilized their special expertise. The result is a decision at odds with this Court's decision in *McConnell*.

N.C. GEN. STAT. § 163-278.6(14) (2003) provides:

> The term "political committee" means a combination of two or more individuals, such as any person, committee, association, organization, or other entity that makes, or accepts anything of value to make, contributions or expenditures and has one or more of the following characteristics:
> a. Is controlled by a candidate;
> b. Is a political party or executive committee of a political party or is controlled by a political party or executive committee of a political party;
> c. Is created by a corporation, business entity, insurance company, labor union, or professional association pursuant to G.S. 163-278.19(b); or
> d. Has as a major purpose to support or oppose the nomination or election of one or more clearly identified candidates.

The statute further provides, with respect to the question of the major purpose of an entity:

> Supporting or opposing the election of clearly identified candidates includes supporting or opposing the candidates of a clearly identified political party.
>
> *An entity is rebuttably presumed to have as a major purpose to support or oppose the nomination or election of one or more clearly identified candidates if it contributes or expends*

> *or both contributes and expends during an election cycle more than three thousand dollars ($3,000). The presumption may be rebutted by showing that the contributions and expenditures giving rise to the presumption were not a major part of activities of the organization during the election cycle. Contributions to referendum committees and expenditures to support or oppose ballot issues shall not be facts considered to give rise to the presumption or otherwise be used in determining whether an entity is a political committee.*

(Emphasis supplied) In other words, the legislature, based on its expertise with local and state elections in North Carolina, determined that the expenditure of $3,000 on electoral advocacy by an entity supports a rebuttable presumption that such activity is a major purpose of the organization. Just as Congress did in BCRA, the legislature established a threshold based on its experience. This Court in *McConnell* showed deference to such legislative experience. *See, e.g.*, *McConnell*, slip op. at 90-91 (requirement upheld that segregated funds and individuals that spend more than $10,000 in a year on electioneering communications file disclosure reports).

Respondents challenge the $3,000 rebuttable presumption in North Carolina's statute, arguing it is vague and overbroad. The district court rejected respondents' arguments, concluding that "[t]he standard represents a reasonable application of the Supreme Court's conclusion that an

organization whose 'independent spending [has] become so extensive that [its] major purpose may be regarded as campaign activity' may be classified as a 'political committee,' and indeed, may be properly subject to the regulations attending such classification." (App. 90a n.1) (citing *MCFL* at 262). The Fourth Circuit noted that the major purpose presumption is not conclusive because under N.C. GEN. STAT. § 163-278.34A, the state always bears the "burden of proving that an organization has as its major purpose the support or defeat of a candidate." *Id.* Nevertheless, although labeling the issue a "close question," the appeals court found that '[a]ny attempt to define statutorily the major purpose test cannot define the test according to the effect some arbitrary level of spending has on a given election." 344 F.3d at 430. Petitioners presented substantial evidence, however, that when all elections in North Carolina – local and statewide – are taken into account, $3,000 is indeed a significant threshold, and respondents failed to offer any evidence refuting this. Specifically, petitioners' witnesses testified that

> [t]here are hundreds of elections, maybe thousands of elections in North Carolina each year in which it was our feeling that $3,000 could have a significant impact on the outcome of that election. And so that combined with the fact that [$3000] was already a threshold in the law for reporting was why that figure was picked.

(Baddour Dep., p. 40, line 21 - p. 41, line 1 (Ex. Vol. I)) (*See also, e.g.*, Hall Dep., pp. 104-05 (Ex. Vol. II) and Ex. 46, pp. 9-11 (Ex. Vol. IV) ("Based on my review of spending by political

committees and the cost of advertising in North Carolina, I believe the $3,000 level is a generous threshold for the spender."); Southerland Dep. p. 38 (Ex. Vol. II) and Ex. 33 ¶¶8-10 (Ex. Vol. III))

North Carolina's law makes clear in N.C. GEN. STAT. § 163-278.34A that even if an entity spends more than $3,000 on express advocacy, the State retains the burden of proving that it is a "political committee." That statute provides: "In any proceeding brought pursuant to this Article in which a presumption arises from the proof of certain facts, the defendant may offer some evidence to rebut the presumption, but the State bears the ultimate burden of proving the essential elements of its case." *Cf.* N.C. GEN. STAT. § 8C-1, Rule 301 (2003).[2]

Respondents further argue that N.C. GEN. STAT. § 163-278.6(14) impermissibly fails to give notice of how the presumption raised by contributions or expenditures of $3,000 or more can be rebutted and is, therefore, unconstitutionally vague. Again, this contention is refuted by the clear language of the statute. "The presumption may be rebutted by showing that the contributions and expenditures giving rise to the presumption were not a major part of activities of the organization during the election cycle." In other words, an organization need only show

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[2] This North Carolina Rule of Evidence provides that "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

that, despite contributing or expending $3,000 or more on electoral advocacy in a single election cycle, such contributions or expenditures were not part of the organization's primary objectives during the election cycle. This can be shown in numerous ways. It can be shown – as respondents contend it should be – by looking at the amount of the contributions or expenditures relative to an organization's total budget. It can be shown by examining the place of the expenditures or contributions relative to the other activities of the organization. In *MCFL*, the Court looked at all of the statements and activities of MCFL – its statement of purpose in its articles of incorporation, its legislative and public demonstration activities, how it raised its finances, the newsletters that it published, and the "Special Edition" that prompted the FEC's attempted regulation – before determining that it could become subject to regulation as a political committee if electoral advocacy were to become a major purpose of the organization. *MCFL*, 479 U.S. at 241-44, 262. Moreover, if an entity is concerned that it may be deemed to have electoral advocacy as its major purpose, it can seek a binding advisory opinion of the Executive Director of the North Carolina State Board of Elections and thereby remove any doubt as to the applicability of the law to its facts. *See* N.C. GEN. STAT. § 163-278.23. *Cf.* 2 U.S.C. § 437(a)(1) (cited by *McConnell*, slip op. at 62 in rejecting the argument that § 302(20)(A)(ii) is unconstitutionally vague).

NCRL appears to believe there is something magical about not spending more than 50 percent of its over-all budget on contributions or expenditures, and that an organization cannot have a major purpose of electoral advocacy unless it spends at

least half of its resources on it. However, the General Assembly, like this Court in *MCFL,* chose not to establish a given percentage of total spending as an automatic basis for determining whether an entity is a political committee. Representative Baddour testified that he believed the language was sufficient to cover all possible ways an organization's major purpose might be shown. (Baddour Dep., p. 51, lines 16-17 (Ex. Vol. I)) The following exchange between Rep. Baddour and respondents' counsel at that time, Mr. Bungard, is illustrative of why the General Assembly did not choose to set the threshold in terms of a percentage:

> Q. Instead of the $3,000 rebuttable presumption, why didn't you define major purpose to mean the central organizational purpose of an organization as evidenced by its public statements of its purpose or the majority of the organization's disbursements, more than 50 percent?
>
> A. We wanted there to be a broader definition than that.
>
> Q. Broader by meaning what?
>
> A. Well, we didn't want a strict definition of if it is less than 50 percent, then it is not a major purpose. If you take your definition, then you know, you have

either got to practically say it is a major purpose or it has got to be more than 50 percent of – you used the term "majority"; right?

Q. Uh-huh.

A. We wanted it to be broader than that. We recognized that you can have – if you had a company that has income of a million dollars a year and they are going to come down to North Carolina and pump $400,000 into an election, then that is a major purpose, I think. I think that is the type of entity that if they are, again, engaging in express advocacy, that we would want to capture as a political committee and make them report, but yet they are only spending 40 percent of their income. That is fair. I don't think the constitution – I hope the constitution doesn't prevent us from doing that. We will find out.

(Counsel confer.)

Q. Okay. In your hypothetical, would that have to be the organization's – would that be the organization's major purpose, than 40 percent? The other purposes are

> less than that? Let's say it was 60 percent something else and 40 percent spending on North Carolina elections.
>
> A. In my opinion, if I were making the decision and an entity spent $400,000 in North Carolina elections out of a million dollars worth of income, irrespective of what they were doing with the other $600,000, I would think that was a major purpose.

(Baddour Dep., p. 42, line 7 - p. 43, line 16 (Ex. Vol. I))

For these reasons, the fourth Circuit improperly determined that N.C. GEN. STAT. § 163-278.6(14) is unconstitutionally overbroad. Respondents have not shown and cannot show that the law "reaches a substantial amount of constitutionally protected conduct," *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, *reh'g denied*, 456 U.S. 950 (1982), nor have they shown that the law "could never be applied in a valid manner," *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988). Similarly, the Fourth Circuit improperly determined that N.C. GEN. STAT. § 163-278.6(14) is unconstitutionally vague, because Respondents have not shown that the law is "impermissibly vague in all of its applications," *Hoffman Estates*, 455 U.S. at 497, nor have they shown that the law fails to give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act

accordingly," *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The decision of this Court in *McConnell* teaches that deference should be accorded legislative decisions in an area in which legislators have special expertise. Surely, the Fourth Circuit would evaluate this "close question" differently in light of the significant deference shown to Congress in a variety of campaign finance areas.

III. NORTH CAROLINA'S CONTRIBUTION LIMIT OF $4,000 PER PRIMARY OR ELECTION MAY BE CONSTITUTIONALLY APPLIED TO A POLITICAL COMMITTEE THAT STATES IT INTENDS TO MAKE ONLY INDEPENDENT EXPENDITURES WHEN AFFILIATED POLITICAL COMMITTEES WITH THE SAME OFFICERS AND MEMBERS MAKE CONTRIBUTIONS TO POLITICAL CAMPAIGNS AND ITS PARENT CORPORATION MAKES CONTRIBUTIONS FROM THE CORPORATE TREASURY TO POLITICAL CAMPAIGNS.

McConnell reiterates that any review of campaign contribution limits requires less rigorous scrutiny to determine whether the limit is "closely drawn." "[A] contribution limit involving even '"significant interference"' with associational rights is nevertheless valid if it satisfies the 'lesser demand' of being '"closely drawn"' to match a '"sufficiently important interest."'" *McConnell*, slip op. at 25-26 (quoting *Beaumont*,

slip op. at 15 and *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000)). Further underpinning the *McConnell* decision is considerable deference to the legislative effort in BCRA to prevent circumvention of campaign finance disclosure provisions and restrictions on sources and amounts of funding. For example, this Court upheld section 323(f) of BCRA which restricts soft money contributions to state and local candidates for "public communications," defined in 2 U.S.C.A. § 301(20)(A)(iii) as "a communication that 'refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office.'" *McConnell*, slip op. at 76. This Court rejected the argument that such contributions "do not corrupt or appear to corrupt *federal* elections," reasoning that "state and local candidates and officeholders will become the next conduits for the soft-money funding of sham issue advertising" and Congress has a "strong interest in preventing circumvention of otherwise valid contribution limits." *McConnell*, slip op. at 77-78. Presumably, some of the contributions to these state and local candidates would be used to pay for advertisements that would be independent expenditures; nevertheless, the *McConnell* decision found § 323(f) to be constitutional.

Just as Congress adopted BCRA to address the use of conduits (soft money committees and sham advocacy committees) to circumvent contribution limits, so North Carolina has enacted laws to address similar real world problems involving independent spenders in elections. The State in this case offered testimony about how a handful of

wealthy individuals and corporations financed advertisements against state candidates after failing to gain concessions from legislative leaders who were not running in those candidates' races. Robert H. Hall, an expert in campaign finances in North Carolina, in deposition testimony cited, among other examples of this corrupting influence on the electoral process, an instance in which an organization known as Farmers for Fairness threatened leaders of the North Carolina General Assembly[3] that it would run advertisements against certain vulnerable legislators in retaliation for votes against the hog industry in North Carolina. (Hall Dep., pp. 87-89, 117-19 (Ex. Vol. __)) The Fourth Circuit had found in separate litigation that Farmers for Fairness had engaged only in "issue advocacy" in an aggressive campaign against two rural, Republican legislators. *Perry v. Bartlett*, 231 F.3d 155, 158-59 (4th Cir. 2000), *cert. denied, Bartlett v. Perry*, 532 U.S. 905 (2001) ("While Farmers does make expenditures that may incidentally influence the results of an election, it does not in explicit words or by express terms advocate the election or defeat of a candidate.") In other words, Farmers for Fairness was North Carolina's version of the organizations described at pages 15 to 18 of the *McConnell* decision. Nevertheless, the Fourth Circuit concluded its actions were not "corruptive," and the district court relied on that finding in the instant case in concluding that the petitioners had not offered any evidence that the contribution limit prevented corruption or the appearance of corruption when applied to

---

[3] Republicans in the House of the North Carolina General Assembly narrowly held the majority at that time, and every seat was important to maintenance of that majority.

independent expenditure political committees. (App. 75a) Likewise, the Fourth Circuit concluded that "[t]he State failed to proffer sufficiently convincing evidence which demonstrates that there is a danger of corruption due to the presence of unchecked contributions to [independent expenditure political action committees]." 344 F.3d at 434. The Court improperly narrowed its concern to what this Court called a "crabbed" understanding of corruption, failing to recognize the real threat to the integrity of the election process created by an independent expenditure committee financed with unlimited contributions from a handful of donors who interact with political leaders not directly involved in the election. The *McConnell* decision, on the other hand, recognized that

> candidates and officials knew who their friends were and 'sometimes suggest[ed] that corporations or individuals make donations to interest groups that run 'issue ads.' As with soft-money contributions, political parties and candidates used the availability of so-called issue ads to circumvent FECA's limitations, asking donors who contributed their permitted quota of hard money to give money to nonprofit corporations to spend on 'issue advocacy.'

McConnell, slip op. at 18.

Finally, this Court in *McConnell* took a pragmatic, common sense view of the whole campaign finance approach adopted by Congress in determining the constitutionality of

various provisions of BCRA. With that approach, it is important for lower courts to place the questions they face in context. Here, NCRL-FIPE is only a part of a multi-faceted campaign structure adopted by NCRL. First, the non-profit corporation itself has the right to make contributions and expenditures to candidates, parties and political committees under N.C. GEN. STAT. § 163-278.19(f). NCRL is the parent entity for a longstanding state political committee and for a separate federal political committee. Both of these entities can and do make contributions to state and federal candidates. NCRL-FIPE was formed by NCRL "for the sole purpose of making independent expenditures in North Carolina state elections in order to further the goals and purposes of North Carolina Right to Life, Inc." (Complaint, Ex. E) The entities have a history of relying on the same persons to serve both entities as PAC Director, President and Treasurer. (Ex. 86, App. 111a) Given the interwoven relationships of these entities, it defies common sense to state that the expenditures made by NCRL-FIPE will truly be independent of the contributions made by NCRL and its other political committees. For all of these reasons, the lower court should reconsider its decision in light of *McConnell*.

CONCLUSION

There is an overwhelming amount of analysis in the *McConnell* opinion to absorb and apply in the short time since it was issued. It is clear, however, that the Fourth Circuit's decision in the instant case was driven by its "bright-line" distinction between express and issue advocacy, its lack of deference to legislative efforts to responsibly address thorny campaign finance issues, and its lack of understanding that it was at liberty to adopt a pragmatic approach to the issues it faced and address them at a practical, rather than purely theoretical, level. For these reasons, petitioners respectfully request that their petition be granted, the decision of the Fourth Circuit vacated, and the case remanded to it for reconsideration in light of the *McConnell* decision.

Respectfully submitted,

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Attorney General

Susan K. Nichols
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Special Deputy Attorney General

December 22, 2003

APPENDIX

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NORTH CAROLINA RIGHT TO LIFE, INCORPORATED; NORTH CAROLINA RIGHT TO LIFE POLITICAL ACTION COMMITTEE; NORTH CAROLINA RIGHT TO LIFE COMMITTEE FUND FOR INDEPENDENT POLITICAL EXPENDITURES, Plaintiffs-Appellees, v. LARRY LEAKE, in his official capacity as Chairman of the North Carolina State Board of Elections; GENEVIEVE C. SIMS, in her official capacity as Secretary of the State Board of Elections; ROBERT CORDLE, in his official capacity as a member of the State Board of Elections; LORRAINE G. SHINN, in her official capacity as a member of the State Board of Elections; CHARLES WINFREE, in his official capacity as a member of the State Board of Elections; ROBERT F. JOHNSON, in his official capacity as District Attorney for the North Carolina Prosecutorial District 15A; ROY COOPER, in his official capacity as the North Carolina Attorney General, Defendants-Appellants. NORTH CAROLINA RIGHT TO LIFE, INCORPORATED; NORTH CAROLINA RIGHT TO LIFE POLITICAL ACTION COMMITTEE; NORTH CAROLINA RIGHT TO LIFE COMMITTEE FUND FOR INDEPENDENT POLITICAL EXPENDITURES, Plaintiffs-Appellants, v. LARRY LEAKE, in his official capacity as Chairman of the North Carolina State Board of Elections; GENEVIEVE C. SIMS, in her official capacity as Secretary of the State Board of Elections; ROBERT CORDLE, in his official capacity as a member of the State Board of Elections; LORRAINE G. SHINN, in her official capacity as a member of the State Board of

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Elections; CHARLES WINFREE, in his official capacity as a member of the State Board of Elections; ROBERT F. JOHNSON, in his official capacity as District Attorney for the North Carolina Prosecutorial District 15A; ROY COOPER, in his official capacity as the North Carolina Attorney General, Defendants-Appellees.

No. 02-2052, No. 02-2053

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

344 F.3d 418

May 6, 2003, Argued
September 23, 2003, Decided

PRIOR HISTORY: Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, Chief District Judge. (CA-99-798-5-BO).

DISPOSITION: Affirmed in part and reversed in part.

COUNSEL: ARGUED: Alexander McClure Peters, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellants.

James Bopp, Jr., BOPP, COLESON & BOSTROM, Terre Haute, Indiana, for Appellees.

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ON BRIEF: Roy Cooper, North Carolina Attorney General, Susan K. Nichols, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellants.

Eric C. Bohnet, BOPP, COLESON & BOSTROM, Terre Haute, Indiana, for Appellees.

JUDGES: Before WIDENER and MICHAEL, Circuit Judges, and Frank W. BULLOCK, Jr., United States District Judge for the Middle District of North Carolina, sitting by designation. Judge Bullock wrote the opinion, in which Judge Widener joined. Judge Michael wrote an opinion concurring in part and dissenting in part.

OPINION BY: BULLOCK

OPINION: **[*420]** BULLOCK, District Judge:

Appellees North Carolina Right to Life, Inc. ("NCRL"), North Carolina Right to Life Political Action Committee ("NCRLPAC"), and North Carolina Right to Life Committee Fund for Independent Political Expenditures ("NCRLC-FIPE") filed suit in federal court challenging the constitutionality of certain provisions of North Carolina's election and campaign finance laws. In a mixed result for both sides, the district court declared certain of the challenged provisions unconstitutional and permanently enjoined the State of North Carolina from

enforcing those provisions. Both sides now appeal. For the reasons that follow, we affirm in part and reverse in part.

I.

NCRL is a non-profit, membership corporation, incorporated in North Carolina, with local chapters throughout the State. According to NCRL, its major purpose is not the nomination or election of candidates, but rather to educate North Carolinians **[*421]** regarding pro-life issues. NCRLPAC is an internal political committee established by NCRL to engage in express advocacy consistent with the views of NCRL. NCRLPAC's primary purpose is to support or oppose specific candidates and political parties. NCRLC-FIPE is also an internal political action committee created by NCRL. Its sole purpose is to make independent expenditures and it may not make monetary or inkind contributions to candidates.

This action is the sequel to litigation that was commenced in 1996, in which NCRL successfully challenged certain provisions of the North Carolina campaign finance laws. *See North Carolina Right to Life, Inc. v. Bartlett,* 168 F.3d 705 (4th Cir. 1999) ("*NCRL I*"). Responding to this court's decision, the North Carolina General Assembly adopted legislation that amended, deleted, and added campaign finance statutes. Following these legislative changes, NCRL filed this suit again challenging as facially unconstitutional certain provisions of these statutes.

First, NCRL challenged the provision setting forth the method for determining whether a communication supports or

opposes the nomination or election of a particular candidate. N.C. Gen. Stat. § 163-278.14A(a)(2) (2001). NCRL argued that the statute unconstitutionally regulates issue advocacy. Second, NCRL challenged North Carolina's definition of political committee on the ground that it unconstitutionally presumes that an entity has as a major purpose to support or oppose a candidate when an entity contributes or expends more than $ 3,000.00 during an election cycle. *Id.* § 163-278.6(14). Third, NCRL challenged the $ 4,000.00 contribution limit to independent expenditure political action committees on the ground that such contributions do not present the risk of *quid pro quo* corruption or its appearance. *Id.* § 163-278.13. Fourth, NCRL challenged the provision requiring that entities making expenditures on printed material or advertisements that name candidates to report such expenditures. *Id.* § 163-278.12A. Finally, NCRL challenged the requirement that a sponsor must provide a disclaimer of support or opposition for a candidate in its advertisements. *Id.* § 163-278.39(a)(3).

NCRL and the State filed cross motions for summary judgment pursuant to Federal Rule of Civil Procedure 56. On October 24, 2001, the district court granted summary judgment for NCRL on two of the three primary statutory provisions at issue and enjoined their enforcement. As to Section 163-278.14A(a)(2), the district court held that the provision impermissibly broadened the scope of "express advocacy" as defined by the Supreme Court in *Buckley v. Valeo,* 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976). Section 163-278.14A(a)(2), according to the district court, is unconstitutional because it "does not limit the scope of 'express

advocacy' to communications that literally include words that, in and of themselves, advocate the election or defeat of a candidate, as was required in *Buckley*." (J.A. at 183-84.) With regard to Section 163-278.6(14), which incorporates Section 163-278.14A, the district court held in an amended order that it could be read constitutionally provided Section 163-278.14A(a)(2) was severed from the rest of the section. The district court rejected NCRL's position that Section 163-278.6(14)'s presumption of political committee status based on an entity's expenditures violated the First Amendment. With regard to Section 163-278.13, the district court held that a limit on contributions to political committees that engage solely in making independent expenditures was unconstitutional. Finally, the district court held that NCRL's **[*422]** challenge to Sections 163-278.12A and 163-278.39(a)(3) was moot.

Both parties now appeal. The State appeals on the grounds that the district court erred in declaring Sections 163-278.14A(a)(2) and 163-278.13 unconstitutional. NCRL appeals claiming that the district court erred in dismissing its challenge to Section 163-278.6(14)'s major purpose presumption. NCRL also assigns as error the district court's determination that its challenge to Section 163-278.12A was moot.

II.

Before addressing the merits of the parties' contentions, an understanding of the statutory provisions at issue is necessary. Under Section 163-278.6(14), a "political committee" is defined to mean:

a combination of two or more individuals, such as any per son, committee, association, organization, or other entity that makes, or accepts anything of value to make, contributions or expenditures and has one or more of the following characteristics:

a. Is controlled by a candidate;

b. Is a political party or executive committee of a political party or is controlled by a political party or executive committee of a political party;

c. Is created by a corporation, business entity, insurance company, labor union, or professional association pursuant to G.S. 163-278.19(b); or

d. Has as a major purpose to support or oppose the nomination or election of one or more clearly identified candidates.

. . .

An entity is rebuttably presumed to have as a major purpose to support or oppose the nomination or election of one [**7] or more clearly identified candidates if it contributes or

> expends or both contributes and expends during an election cycle more than three thousand dollars ($ 3,000). The presumption may be rebutted by showing that the contributions and expenditures giving rise to the presumption were not a major part of activities of the organization during the election cycle . . . .

N.C. Gen. Stat. § 163-278.6(14) (2001). Accordingly, to be regarded as a political committee, and therefore be subject to the regulations attendant to that status, requires that an entity (1) make contributions or expenditures and (2) have one or more of the enumerated characteristics.

An expenditure, and similarly a contribution, is defined as "any purchase, advance, conveyance, deposit, distribution, transfer of funds, loan, payment, gift, pledge or subscription of money or anything of value whatsoever, . . . to support or oppose the nomination [or] election . . . of one or more clearly identified candidates." *Id.* § 163-278.6(9); *see also id.* § 163-278.6(6) (similarly defining the term "contribution"). To determine whether a purchase or advance is made to "support or oppose" a candidate, and thus be considered an expenditure, an "express advocacy" test is employed. Section 163-278.14A, which sets forth the two alternative prongs of the express advocacy test, provides:

> (a) Either of the following shall be means, but not necessarily the exclusive or conclusive means, of proving that an individual or other

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entity acted "to support or oppose the nomination or election of one or more clearly identified candidates":

> (1) Evidence of financial sponsorship of communications to the general public that use phrases such as "vote for", "reelect", "support", **[*423]** "cast your ballot for", "(name of candidate) for (name of office)", "(name of candidate) in (year)", "vote against", "de feat", "reject", "vote pro-(policy position)" or "vote anti-(policy position)" accompanied by a list of candidates clearly labeled "pro (policy position)" or "anti-(policy position) ", or communications of campaign words or slogans, such as posters, bumper stickers, advertisements, etc., which say "(name of candidate)'s the One", "(name of candidate) '98", "(name of candidate)!", or the names of two candidates joined by a hyphen or slash.

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(2) Evidence of financial sponsorship of communications whose essential nature expresses electoral advocacy to the general public and goes beyond a mere discussion of public issues in that they direct voters to take some action to nominate, elect, or defeat a candidate in an election. If the course of action is unclear, contextual factors such as the language of the communication as a whole, the timing of the communication in relation to events of the day, the distribution of the communication to a significant number of registered voters for that candidate's election, and the cost of the communication may be considered in determining whether the action urged could only be interpreted by a reason able person as advocating the nomination, election, or defeat of that candidate in that election.

Id. § 163-278.14A(a). If a communication supports or opposes a particular candidate, as determined by application of the two methods described above, an entity's financial sponsorship of that communication will be deemed an expenditure, and thus satisfy the first requirement of the political committee definition.

The second requirement for designation as a political committee, in addition to the contribution and expenditure requirement, is that an entity qualify as one of the following: (1) a candidate-controlled organization; (2) a political party; (3) an organization created by a corporation, business entity, insurance company, labor union, or professional association; or (4) an organization that "has as a major purpose to support or oppose the nomination or election of one or more clearly identified candidates." *Id.* § 163-278.6(14). For purposes of this appeal, only the "major purpose" characteristic is at issue. North Carolina's "major purpose" test provides that if an entity makes more than $3,000.00 in contributions and/or expenditures during an election cycle, it is presumed to have as a "major purpose" the election or defeat of a candidate. *Id.* An entity may rebut the presumption by "showing that the contributions and expenditures giving rise to the presumption were not a major part of activities of the organization during the election cycle." *Id.* Ultimately, however, the State bears the

burden of proving that an entity's major purpose is to support or oppose a particular candidate. *Id.* § 163-278.34A.[1]

As a consequence of being regarded by the State as a political committee, an entity is subject to administrative and regulatory requirements. A political committee is required to appoint a treasurer, file a **[*424]** statement of organization, maintain detailed accounts of all contributions received and expenditures made, and file periodic statements with the State Board of Elections. *Id.* § § 163-278.7, .8, .9, .11. If an entity fails to comply with these requirements, it may be subject to prosecution for a class 2 misdemeanor, as well as civil late-filing fines. *Id.* § 163-278.27, .34.

In addition to the provisions relating to the definition of political committee, NCRL challenged Section 163-278.13, which defines the limits on contributions an individual or entity can make. Section 163-278.13 provides in part: "No individual, political committee, or other entity shall contribute to any candidate or other political committee any money or make any other contribution in any election in excess of four thousand dollars ($ 4,000) for that election." *Id.* § 163-278.13(a). This contribution limit applies equally to contributions made to "independent expenditure political committees", *i.e.*, political

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[1] Section 163-278.34A provides: "In any proceeding brought pursuant to this Article in which a presumption arises from the proof of certain facts, the defendant may offer some evidence to rebut the presumption, but the State bears the ultimate burden of proving the essential elements of its case."

committees that make only independent expenditures. An independent expenditure, in turn, is defined to mean "an expenditure to support or oppose the nomination or election of one or more clearly identified candidates that is made without consultation or coordination with a candidate or agent of a candidate." *Id.* § 163-278.6(9a).

The final statutory provisions challenged merit no discussion of their terms. We have already declared Section 163-278.12A unconstitutional in *Perry v. Bartlett,* 231 F.3d 155 (4th Cir. 2000), and Section 163-278.39(a)(3) was repealed by the General Assembly effective August 10, 2001.

We now turn to the merits which we review under the "exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley v. Valeo,* 424 U.S. 1, 44-45, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976); *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 252, 93 L. Ed. 2d 539, 107 S. Ct. 616 (1986) ("*MCFL*") (stating that a statutory provision that burdens political speech must be justified by a compelling state interest).

III.

The Supreme Court adopted in *Buckley* a bright-line test for determining whether communications may constitutionally be regulated as electoral advocacy. Under the Court's "express advocacy" test, only expenditures for "communications that include explicit words of advocacy of election or defeat of a candidate" are subject to regulation.

Buckley, 424 U.S. at 43. The rationale for the Court's bright-line rule was that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Id.* at 42. Accordingly, the Court "refused to adopt a standard allowing regulation of any advertisement that mentions a candidate's stand on an issue." *Perry,* 231 F.3d at 160 (citing *Buckley,* 424 U.S. at 42-43). The Court provided, in a now famous footnote, a list of illustrative words and phrases that qualify as "express words of advocacy." *Buckley,* 424 U.S. at 44 n.52.

The first prong of North Carolina's "express advocacy" test mirrors the "express advocacy" test adopted in *Buckley* and reaffirmed in *MCFL.* Section 163-278.14A(a)(1) provides that an entity acts to support or oppose a particular candidate when it uses words or phrases such as "vote for", "reelect", "support", "defeat", "reject", "vote pro-(policy position)" accompanied by a list of candidates clearly labeled "pro-(policy position)", etc. N.C. Gen. Stat. § 163-278.14A(a)(1) **[*425]** (2001). NCRL does not challenge the validity of this provision. Rather, its challenge is directed to the second prong of North Carolina's express advocacy test.

If an entity does not satisfy the first prong of the North Carolina express advocacy test, the second prong, or "context prong," provides an additional means of determining whether an entity acts to support or oppose a candidate. Under the

context prong, the following is a means of proving that an entity acted to support or oppose a candidate:

> Evidence of financial sponsorship of communications whose essential nature expresses electoral advocacy to the general public and goes beyond a mere discussion of public issues in that they direct voters to take some action to nominate, elect, or defeat a candidate in an election. If the course of action is unclear, contextual factors such as the language of the communication as a whole, the timing of the communication in relation to events of the day, the distribution of the communication to a significant number of registered voters for that candidate's election, and the cost of the communication may be considered in determining whether the action urged could only be interpreted by a reasonable person as advocating the nomination, election, or defeat of that candidate in that election.

Id. § 163-278.14A(a)(2).

The district court held that the context prong of Section 163-278.14A impermissibly regulates issue advocacy. This test, the district court held, violates the express advocacy test adopted by the Supreme Court in that it "does not limit the scope of 'express advocacy' to include only 'clear words that "directly fit the term ['express advocacy'],"'" but instead allows

consideration of various contextual factors. (J.A. at 186.) We agree, and thus Section 163-278.14A(a)(2) is unconstitutionally vague and overbroad.[2]

The ability to consider a communication's context, the State contends, was expressly approved by this court in *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1052-55 (4th Cir. 1997) ("*CAN II*"). In *CAN II*, we cited the Ninth Circuit decision in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), summarizing its holding as permitting, in those instances where political communications do include an explicit directive to

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[2] Our dissenting colleague would uphold the first sentence of Section 163-278.14A(a)(2) as focusing only on express advocacy and faithful to the Supreme Court's analysis in *MCFL*. The dissent correctly notes that the Court in *MCFL* looked to the "essential nature" of the communication in determining whether it communicated electoral advocacy of a particular candidate. Yet while the Court considered the communication's essential nature, the focus of the Court's inquiry, as dictated by *Buckley*, remained on the actual words of advocacy. No such limitation is provided for under the "essential nature" standard of the first sentence. This circuit, however, has consistently interpreted *Buckley* as allowing regulation "only if it [is] limited to expenditures for communications that literally include *words which in and of themselves* advocate the election or defeat of a candidate." *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 391 (4th Cir. 2001) (quoting *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir. 1997)). We believe, therefore, that the first sentence of Section 163-278.14A(a)(2) impermissibly dilutes the *Buckley* standard by allowing regulation of communications which do not contain explicit words of advocacy.

voters to take some course of action but that course of action is unclear, consideration of "context" in determining whether the action urged is the election or defeat of a particular candidate. *CAN II, 110 F.3d at 1054.* The State's reliance on **[*426]** our acknowledgment of *Furgatch,* however, is misplaced.

Our statement in *CAN II* regarding the Ninth Circuit's express advocacy test was not a statement of the law in this circuit. The court in *CAN II* was not tasked with determining the constitutionality of a particular regulation; that determination had already been made in an earlier decision. *FEC v. Christian Action Network,* 894 F. Supp. 946 (W.D. Va. 1995), *aff'd,* 92 F.3d 1178, 1996 WL 431996 (4th Cir. 1996) (per curiam) (adopting district court opinion). Instead, the issue before the court was whether the FEC's litigation position in the earlier decision lacked substantial justification, and if so whether it was liable for attorney's fees under the Equal Access to Justice Act. *CAN II,* 110 F.3d at 1050. Consequently, this court analyzed *Furgatch* as the broadest judicial description of the Buckley express advocacy test in order to determine whether the FEC was justified in arguing that "*no* words of advocacy are necessary to expressly advocate the election of a candidate." *Id.* at 1064. Therefore, as a pronouncement of this circuit's express advocacy test, *CAN II's* reference to the *Furgatch* holding is not applicable.

Furthermore, the holding in *Furgatch* is contrary to the precedent of this court. This circuit, along with many of our sister circuits, has rejected the expanded view of express advocacy adopted by the Ninth Circuit. *See, e.g., Chamber of*

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Commerce of the United States v. Moore, 288 F.3d 187, 194 (5th Cir. 2002); *Virginia Soc'y for Human Life, Inc. v. FEC,* 263 F.3d 379, 391 (4th Cir. 2001) ("*VSHL II*"); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson,* 236 F.3d 1174, 1187 (10th Cir. 2000); *Vermont Right to Life Comm., Inc. v. Sorrell,* 221 F.3d 376, 386-87 (2d Cir. 2000); *Iowa Right to Life Comm., Inc. v. Williams,* 187 F.3d 963, 969-70 (8th Cir. 1999); *Faucher v. FEC,* 928 F.2d 468, 471 (1st Cir. 1991). Admittedly, the Ninth Circuit's test does not stray far from other articulations of the express advocacy standard. The primary focus of the Ninth Circuit's standard is on the words themselves and in this regard it is consistent with our view of express advocacy. *Furgatch,* 807 F.2d at 864. The Ninth Circuit's view of express advocacy, however, is inconsistent with our view to the extent that it permits consideration of the communication's context in determining whether a communication advocates the election or defeat of a particular candidate for public office. *Id.* at 863-64 ("We conclude that context is relevant to a determination of express advocacy. A consideration of the context in which speech is uttered may clarify ideas that are not perfectly articulated, or supply necessary premises that are unexpressed but widely understood by readers or viewers."). In this regard, the Ninth Circuit's formulation of the express advocacy standard is broader than the brightline rule adopted in this circuit and we reject it as insufficiently protective of the First Amendment.

This court has "steadfastly adhered to the bright-line 'express advocacy' test from *Buckley," Perry,* 231 F.3d at 160, and has ruled repeatedly that communications cannot be

subject to campaign finance restrictions unless they use "explicit words of candidate advocacy." *CAN II,* 110 F.3d at 1051. We have described this circuit's reading of the express advocacy limitation of *Buckley* and *MCFL* as narrow and strict and limited to "'communications that literally include *words which in and of themselves* advocate the election or defeat of a candidate.'" *VSHL II,* 263 F.3d at 391 (quoting *CAN II,* 110 F.3d at 1051). To be faithful to the bright-line standard articulated by the Supreme Court, any inquiry into whether a communication supports or opposes the election of a particular **[*427]** candidate must focus only on the actual words of advocacy.

The State argues that limiting the definition of express advocacy to include speech that includes only "magic words" such as those described in *Buckley's* famous footnote 52 misinterprets the meaning and intent of *Buckley*. To the contrary, this was exactly the meaning and intent of the *Buckley* Court.

> The Court opted for the clear, categorical limitation, that only expenditures for communications using explicit words of candidate advocacy are prohibited, so that citizen participants in the political processes would not have their core First Amendment rights to political speech burdened by apprehensions that their advocacy of issues might later be interpreted by the government as, instead, advocacy of election results.

CAN II, 110 F.3d at 1051. The Supreme Court recognized that application of a bright-line approach would "undoubtedly allow[ ] individuals and organizations to circumvent electoral regulations simply by omitting from their communications the genre of words and phrases that convey the same meaning as the words listed in *Buckley." Chamber of Commerce,* 288 F.3d at 195; *Furgatch,* 807 F.2d at 863. An unequivocal bright-line standard, the *Buckley* Court acknowledged, will "undermine [] [any] limitation's effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or officeholder." *Buckley,* 424 U.S. at 45. Such an approach was nevertheless adopted because "absent the bright-line limitation, the distinction between issue discussion (in the context of electoral politics) and candidate advocacy would be sufficiently indistinct that the right of citizens to engage in the vigorous discussion of issues of public interest without fear of official reprisal would be intolerably chilled." *CAN II,* 110 F.3d at 1051. Thus, while certain entities may be able to skirt just outside of the law's coverage, such a result has already been considered in the Supreme Court's calculus and the Court decided to draw a bright line that would "err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues." *VSHL II,* 263 F.3d at 392 (quoting *Maine Right to Life Comm., Inc. v. FEC,* 914 F. Supp. 8, 12 (D. Me. 1996)).

The context prong of North Carolina's express advocacy test extends the bright-line rule of *Buckley* and this

court beyond a strict and limited analysis of the actual words. Consideration of contextual factors such as "the timing of the communication in relation to events of the day, the distribution of the communication to a significant number of registered voters for that candidate's election, and the cost of the communication" bear no relation to the words themselves. N.C. Gen. Stat. § 163-278.14A(a)(2) (2001). Furthermore, the context prong evaluates communications based upon how they would be interpreted by "a reasonable person." *Id.* This inquiry "shifts the focus of the express advocacy determination away from the words themselves to the overall impression of the hypothetical, reasonable listener or viewer," which is precisely what *Buckley* and its progeny were designed to prohibit. *VSHL II*, 263 F.3d at 391-92. In no event can the distinction between "express advocacy" and "issue advocacy" depend on the understanding of the audience.

> "Whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the **[*428]** general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently

> of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."

Buckley, 424 U.S. at 43 (quoting *Thomas v. Collins,* 323 U.S. 516, 535, 89 L. Ed. 430, 65 S. Ct. 315 (1945)).

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Id.* at 14. The "unfettered interchange of ideas" guaranteed by the First Amendment would be chilled by a regulatory scheme that allowed consideration of anything other than the actual words of advocacy. Because the context prong of the North Carolina express advocacy test permits consideration of a communication's context and a reasonable person's interpretation, it unconstitutionally "shifts the determination of what is 'express advocacy' away from the words 'in and of themselves' to 'the unpredictability of audience interpretation.'" *VSHL II,* 263 F.3d at 392 (quoting *CAN II,* 110 F.3d at 1051, 1057).

The State argues that, even if the context prong impermissibly extends the express advocacy test declared in *Buckley,* the district court erred by failing to apply a limiting construction. It is well-settled that a federal court must uphold

a statute if it is "'readily susceptible' to a narrowing construction that would make it constitutional . . . . The key to application of this principle is that the statute must be 'readily susceptible' to the limitation; we will not rewrite a state law to conform it to constitutional requirements." *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397, 98 L. Ed. 2d 782, 108 S. Ct. 636 (1988). The State proposes that a limiting construction might be that the context prong can be applied only to communications with explicit, verbal directives to voters to take some electoral action and the context factors can be utilized only when the directive to take action is unambiguous but the specific action urged is not clear. It is difficult to discern how this proposed instruction is materially different from what is already provided for in the statute. Reference to criteria outside of the actual words would still be required. Furthermore, this limiting construction does not remove the vagaries inherent in a test dependent on the understanding of the reasonable person under the circumstances. Accordingly, the district did not err in failing to apply a limiting construction.

IV.

As set forth in Section II, *supra*, to be regarded as a political committee requires that an entity (1) make contributions or expenditures and (2) have one or more enumerated characteristics. Among the enumerated characteristics is the requirement that an entity "[have] as a major purpose to support or oppose the nomination or election of one or more clearly identified candidates." N.C. Gen. Stat.

§ 163-278.6(14)(d) (2001). An entity is presumed to have as a major purpose to support or oppose a candidate if it contributes and/or expends more than $ 3,000.00 during an election cycle. *Id.* This presumption may be rebutted by showing that the "contributions and expenditures giving **[*429]** rise to the presumption were not a major part of activities of the organization during the election cycle." *Id.*

NCRL challenged the rebuttable presumption created in the statute arguing that it was both vague and overbroad. The district court rejected NCRL's arguments, holding that the presumption was not violative of the First Amendment. While a close question, we disagree with the district court.

The genesis of the Supreme Court's major purpose test stems from the Court's effort at giving a narrowing construction to the Federal Election Campaign Act's provision requiring that entities falling within the definition of "political committee" make certain financial disclosures. Absent a narrowing construction, the Court noted, the requirement that political committees "disclose their expenditures could raise . . . vagueness problems, for 'political committee' is defined only in terms of amount of annual 'contributions' and 'expenditures,' and could be interpreted to reach groups engaged purely in issue discussion." *Buckley,* 424 U.S. at 79. Accordingly, the Court held:

> To fulfill the purposes of the Act [the term "political committee"] need only encompass organizations that are under the control of a

> candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Id. The Court reiterated this construction of political committee in *MCFL*. 479 U.S. at 252 n.6 (stating that "an entity subject to regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate'").

NCRL argues that an entity can have only one major purpose and that the major purpose test should be predicated on an entity spending more than half of its budget on contributions and expenditures that promote or oppose a candidate's election. Use of a flat monetary trigger, NCRL asserts, is unconstitutional because it looks only to the potential impact of an entity's activities on political debate, rather than an entity's overall activities. Thus, it violates the fundamental principle of the major purpose test in that it fails to identify entities for which express support or opposition of a candidate is so central to their purpose that all their activities can be presumed to advance that purpose.

The district court rejected the proposition that an entity can have but one major purpose and that the only constitutional

standard for determining major purpose is one that requires that an entity allocate fifty percent of its disbursements for candidate advocacy. (J.A. at 240 n.1). Whether an entity can have multiple major purposes and whether a certain percentage is constitutionally mandated are issues we need not decide at this time. n3 The constitutionality of North Carolina's major purpose presumption can instead be decided on a more fundamental principle.[3]

In order to frame the issue properly, it is helpful to understand what the major purpose presumption is not. It is not, as the State correctly points out, conclusive proof of an entity's major purpose. The **[*430]** fact that an entity spends over $ 3,000.00 is only evidence of major purpose. The burden of proving that an organization has as its major purpose the support or defeat of a candidate remains with the State. N.C. Gen. Stat. § 163-278.34A (2001). The presumption merely shifts the burden of production to an entity to offer evidence that its contributions and expenditures were not a major part of its overall activities.

Nevertheless, the constitutional defect of the major purpose presumption is not so much the use of any

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[3] Adopting the narrow construction of the major purpose test advanced by NCRL could lead to curious results however. As the district court noted, an entity with a $ 3 million budget that expends as much as $ 1.4 million advocating the election or defeat of a particular candidate would not qualify as a political committee under NCRL's interpretation.

presumption, but the fact that instead of basing the major purpose standard on the nature of the entity and its overall activities, the standard is based on an arbitrary level of spending that bears no relation to the idiosyncracies of the entity. This shifts the focus from the entity itself, where it belongs, to the effect expenditures generally have on an election. The State presented evidence demonstrating that contributions or expenditures in the amount of $ 3,000.00 are sufficient to have a "significant impact" on a campaign in North Carolina. Whether this is true, and we accept that it is, is immaterial to the determination of whether an entity has as a major purpose to support or oppose a particular candidate.

For example, a $4,000,000.00 organization that spends $3,001.00 and a $4,000.00 organization that spends $ 3,001.00 would both have the same "significant impact" on an election. Yet while the impact of these entities' spending may be the same, their major purpose is not. Any attempt to define statutorily the major purpose test cannot define the test according to the effect some arbitrary level of spending has on a given election. Such a standard poses the threat of subsuming within its presumption entities that have as their "central organizational purpose . . . issue advocacy, although [they] occasionally engage[ ] in activities on behalf of political candidates." *MCFL*, 479 U.S. at 252 n.6. Rather, the test must be based on the nature and overall activities of the entity itself. The test must examine whether an entity's spending in support of or opposition to a candidate has "become so extensive that [its] major purpose may be regarded as campaign activity." *Id.* at 262 (citing *Buckley*, 424 U.S. at 79). This is accomplished

not by simply tabulating an entity's contributions and expenditures, although that is an important factor, but by examining an entity's stated purpose, which is typically reflected in its articles of incorporation, and the extent of an entity's activities and funding devoted to pure issue advocacy versus electoral advocacy. *Id.* at 241-44.[4]

The State nevertheless argues that the major purpose presumption is in full accord with *Buckley* and *MCFL* because an entity is afforded the opportunity to rebut the presumption by showing that its electioneering activities were not a major part of its overall activities. Although the statute provides that the major purpose presumption may be rebutted, the ability to rebut the presumption does nothing to ameliorate the unconstitutionality of a fixed monetary threshold that bears no relation to the *Buckley* and *MCFL* major purpose standard.

The Supreme Court has on two occasions considered the constitutionality of somewhat similar statutory presumptions, **[*431]** and on both occasions the Court declared the presumptions unconstitutional. In *Riley v. National Federation of the Blind*, 487 U.S. 781, 101 L. Ed. 2d

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[4] The Court in *MCFL* considered MCFL's statement of purpose in its articles of incorporation, its legislative and public demonstration activities, how it raised its finances, and its publications before determining that "its central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." *MCFL*, 479 U.S. at 241-43, 252 n.6.

669, 108 S. Ct. 2667 (1988), the Court considered the propriety of a North Carolina statute that prohibited professional fundraisers from retaining an "unreasonable" or "excessive fee." A fee was defined as prima facie unreasonable or excessive according to the percentage of total revenues collected. *Id.* at 793. A fee exceeding thirty-five percent was "presumed unreasonable," but the fundraiser was provided the opportunity to rebut the presumption by proving either that the solicitation involved the dissemination of information or advocacy or that the charity's "ability to raise money or communicate would be significantly diminished." *Id.* at 785-86.

The Court held that this percentage-based test failed to pass constitutional muster. The Court reasoned that because the "solicitation of charitable contributions is protected speech, . . . using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud." *Id.* at 789. The Court rejected the proposition that the opportunity to rebut the presumption of unreasonableness saved the statute. The Court stated that "even where a prima facie showing of unreasonableness has been rebutted, the factfinder must still make an ultimate determination, on a case-by-case basis, as to whether the fee was reasonable . . . ." *Id.* at 786. "Proof that the solicitation involved the advocacy or dissemination of information is not alone sufficient [to rebut the presumption]; it is merely a factor that is added to the calculus submitted to the factfinder, who may still decide that the costs incurred or the fundraiser's profit were excessive." *Id.* at 793. Under this statute, "every campaign incurring fees in

excess of 35% . . . will be subject . . . to potential litigation over the 'reasonableness' of the fee." *Id.* at 794. Fundraisers exposed to this litigation "must bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder." *Id.* The Court concluded, therefore, that the uncertainty and risk created by "this scheme must necessarily chill speech in direct contravention of the First Amendment's dictates." *Id.*

Similarly, in *Virginia v. Black,* a plurality of the Court declared unconstitutional a Virginia cross-burning statute which provided that "'any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.'" 155 L. Ed. 2d 535, 123 S. Ct. 1536, 1550 (2003) (quoting Va. Code Ann. § 18.2-423 (1996)). The plurality reasoned that the prima facie evidence provision "permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense," or at a minimum "makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case." *Id.* Furthermore, because the "prima facie provision makes no effort to distinguish among . . . different types of cross burnings," it potentially can "'skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak.'" *Id.* at 1551 (quoting *infra* at 1561 (Souter, J., concurring in the judgment in part and dissenting in part)). Accordingly, the plurality concluded that the prima facie provision "'creates an unacceptable risk of the suppression of ideas,'" *id.* (quoting *Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 965 n.13, 81 L. Ed. 2d 786, 104 S. Ct. 2839 (1984)), and "chills constitutionally

protected political speech because of the possibility that a **[*432]** State will prosecute--and potentially convict--somebody engaged only in lawful political speech at the core of what the *First Amendment* is designed to protect." *Id.*

The presumption at issue here presents the same problems identified by the Court in *Riley* and *Black*. Although arguably less egregious because the burden of proof remains on the State, the chilling effect recognized by the Court in *Riley* and *Black* is nevertheless present. Spending over $ 3,000.00 in contributions and expenditures may be evidence of major purpose for some entities, but it is not evidence of major purpose for all. Yet the presumption poses the potential of skewing the factfinder's deliberation toward a finding of major purpose for every entity that spends more than $ 3,000.00 on electoral advocacy. Even in cases where an entity proffers evidence demonstrating that its major purpose is not to support or oppose a particular candidate, the presumption may encourage a factfinder to err on the side of a finding of major purpose. *See Black,* 123 S. Ct. at 1561 (Souter, J., concurring in the judgment in part and dissenting in part).

Furthermore, entities that exceed the monetary threshold will be subject to litigation and must bear the cost of that litigation. In addition to the costs of litigation, an entity must consider the appreciable risk of a mistaken adverse determination. A determination of major purpose will consequently lead to regulation as a political committee and thereby subject an entity to costly disclosure and reporting requirements. Moreover, an entity subsequently determined to

be a political committee that fails to comply with these requirements may be subject to prosecution for a class 2 misdemeanor and imposition of civil fines. The only alternative available to entities unwilling to expose themselves to these costs, therefore, is to not engage in political speech above the level proscribed by the State. But as the Supreme Court concluded in *Riley* and *Black*, such an alternative unacceptably leads to the suppression and chilling of protected political speech.

The State certainly has an interest in regulating an entity's spending aimed at supporting or opposing a particular candidate's election. The State's interest in regulating the level of spending on electoral advocacy, however, is protected by disclosure and reporting requirements applicable to individuals and entities not otherwise subject to reporting requirements. *See* N.C. Gen. Stat. § 163-278.12 (2001). NCRL is required to file with the appropriate board of elections a statement of all independent expenditures and contributions in excess of $ 100.00. *Id.* § 163-278.12(a)-(b). Similarly, NCRL is required to disclose to the State Board of Elections the identification of each entity making a donation of more than $ 100.00 to NCRL if the donation was made for the purpose of furthering NCRL's reported independent expenditures or contributions. *Id.* § 163-278.12(c). "The state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee . . . ." *MCFL*, 479 U.S. at 262.

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The State's desire to establish a bright-line rule for when the process of determining an entity's major purpose should commence is understandable.[5] The presumption **[*433]** is easily applied. Administrative convenience, however, does not present a sufficient justification for infringing First Amendment freedoms. *Riley,* 487 U.S. at 795 (stating that "the First Amendment does not permit the State to sacrifice speech for efficiency"). Therefore, because the monetary trigger contained in Section 163-278.6(14) fails to account for the overall activities of an entity and may be used as evidence of an entity's major purpose, we hold that it is unconstitutionally overbroad. We do not suggest, however, that any presumption in this context is *per se* unconstitutional. Our holding is limited to the major purpose presumption before us which is based entirely on a monetary standard completely untethered from the other factors identified by the Supreme Court in determining major purposes. The portion of Section 163-278.6(14) relating to the major purpose presumption is therefore substantially overbroad and invalid, and we disagree with the district court in this respect. However, the remaining portions of Section

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[5] The State contends that the presumption serves as an alert to an entity that is considering undertaking electioneering-type activities to monitor its spending because expenditures in excess of $ 3,000.00 might provoke a complaint to the Board of Elections. A complaint, in turn, might trigger an inquiry into whether the entity's major purpose was to support or oppose a candidate.

163-278.6(14) can be severed and given effect without the invalid portion. *See* N.C. Gen. Stat. § 163-278.5 (2001).[6]

V.

In addition to the challenges relating to the definition of political committee, NCRL challenged North Carolina's contribution limit to the extent that it applies to "independent expenditure political action committees" ("IEPAC"). Section 163-278.13 provides that no individual may contribute to any political committee in excess of $ 4,000.00 during any single election cycle. *Id.* § 163-278.13. This contribution limit applies with equal force to contributions made to IEPACs, *i.e.*, committees that make only independent expenditures. An independent expenditure is defined as an expenditure "that is made without consultation or coordination with a candidate or agent of a candidate." *Id.* § 163-278.6(9a).

The Supreme Court has "'consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.'" *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387, 145 L. Ed. 2d 886, 120 S. Ct. 897 (2000) (quoting *MCFL*, 479 U.S. at 259-60). "[A] contribution limit involving 'significant

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[6] Section 163-278.5 provides in relevant part: "The provisions of this Article are severable. If any provision is held invalid by a court of competent jurisdiction, the invalidity does not affect other provisions of the Article that can be given effect without the invalid provision."

interference' with associational rights [can] survive if the Government demonstrates that contribution regulation [is] 'closely drawn' to match a 'sufficiently important interest.'" *Id.* at 387-88 (quoting *Buckley,* 424 U.S. at 25) (citation omitted) (internal quotation marks omitted). The State has a "sufficiently important interest" in regulating contributions in order to prevent *quid pro quo* corruption of and undue influence upon candidates. The State's interest in preventing corruption, however, is "not confined to bribery of public officials, but extend [s] to the broader threat from politicians too compliant with the wishes of large contributors." *Id.* at 389.

In addressing limitations on independent expenditures, the Supreme Court stated that the absence of coordination or control between the candidate and the IEPAC making the independent expenditure "not only undermines the value of the expenditure **[*434]** to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley,* 424 U.S. at 47; *see also FEC v. National Conservative Political Action Comm.,* 470 U.S. 480, 498, 84 L. Ed. 2d 455, 105 S. Ct. 1459 (1985) ("*NCPAC*"); *Colorado Republican Fed. Campaign Comm. v. FEC,* 518 U.S. 604, 617-18, 135 L. Ed. 2d 795, 116 S. Ct. 2309 (1996) (stating that the fact that independent expenditures are not coordinated with a candidate prevents the "assumption, absent convincing evidence to the contrary, that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system"). "The fact that candidates and elected officials may alter or reaffirm their own positions on issues in

response to political messages paid for by [political action committees] can hardly be called corruption . . . ." *NCPAC*, 470 U.S. at 498.

While the Supreme Court has not addressed the constitutionality of limits on contributions to IEPACs, the Court has considered the constitutionality of limits on contributions to political action committees that contribute to candidates. *California Med. Ass'n v. FEC*, 453 U.S. 182, 69 L. Ed. 2d 567, 101 S. Ct. 2712 (1981) ("*Cal-Med*"). In *Cal-Med*, the Court upheld a limitation on contributions to multi-candidate political committees, which by definition make contributions directly to candidates. Justice Blackmun in his concurrence stressed, however, that a different result would follow if a contribution limit "were applied to contributions to a political committee established for the purpose of making independent expenditures." *Id.* at 203. Justice Blackmun further explained that multi-candidate political committees are "essentially conduits for contributions to candidates, and as such they pose a perceived threat of actual or potential corruption. In contrast, contributions to a committee that makes only independent expenditures pose no such threat." *Id.*

The State argues that it proffered sufficient evidence to demonstrate the corruptive danger posed by independent expenditures and therefore the need to limit contributions to IEPACs. "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink Missouri*, 528 U.S. at 391. If NCRL's challenge

was to the limitation on contributions made to a candidate, either directly or through a political committee, the evidence presented by the State would be sufficient. However, because the corruptive influence of contributions for independent expenditures is more novel and implausible than that posed by contributions to candidates, convincing evidence of corruption is required. *Colorado Republican,* 518 U.S. at 618. The State, however, failed to proffer sufficiently convincing evidence which demonstrates that there is a danger of corruption due to the presence of unchecked contributions to IEPACs. We agree with the district court that the $ 4,000.00 limitation on contributions to IEPACS is substantially overbroad and unconstitutional.

VI.

The final issue for our consideration is whether the district court erred in holding that NCRL's challenge to Section 163-278.12A was moot under our holding in *Perry*. NCRL contends the issue is not moot because the district court's injunction in *Perry* prohibited the State from enforcing Section 163-278.12A only against the **[*435]** plaintiff in that action. The district court in *Perry,* however, did not reach the constitutionality of the statute, finding that the issue was moot under *NCRL I*. On appeal in *Perry,* we held that the district court erred in failing to reach the constitutionality of the statute. Nevertheless, because the question was purely a legal one, we determined that a remand was unnecessary and reached the constitutional question. *Perry,* 231 F.3d at 160. We concluded that "because Section 12A would allow the

regulation of issue advocacy . . . *it is unconstitutionally overbroad and the State is permanently enjoined from enforcing it." Id.* at 162 (emphasis added). No limitation as to the application of the injunction was indicated. Accordingly, because the injunction prohibits the State from enforcing Section 163-278.12A, a determination by the district court in this action was unnecessary and the district court was correct in declaring NCRL's challenge moot.

VII.

In sum, we conclude that the district court did not err in holding the context prong of North Carolina's express advocacy test unconstitutional. Nor did the district court err in declaring the limit on contributions unconstitutional to the extent that it applies to IEPACs. We conclude, however, that the district court erred in failing to hold that the major purpose presumption was unconstitutional. Finally, we reject NCRL's claim that the district court erred in finding its challenge to *Section 163-278.12A* moot. Thus, for the reasons stated, the judgment of the district court is hereby

AFFIRMED IN PART AND REVERSED IN PART.

CONCUR BY: MICHAEL (In Part)

DISSENT BY: MICHAEL (In Part)

DISSENT: MICHAEL, Circuit Judge, concurring in part and dissenting in part:

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I concur in parts I, II, IV, and V of the majority's opinion. I concur in part III insofar as it discusses and strikes down the second sentence of N.C. Gen. Stat. § 163-278.14A(a)(2), a statute that describes evidence that is sufficient to prove "that communications are 'to support or oppose the nomination or election of one or more clearly identified candidates.'" *Id.* § 163-278.14A (2002). I respectfully dissent from the majority's decision in part III to strike down the first sentence of § 163-278.14A(a)(2). The first sentence is an explicative definition of express advocacy that passes muster under *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 93 L. Ed. 2d 539, 107 S. Ct. 616 (1986) (*MCFL*), and *Buckley v. Valeo*, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976). I also concur in the result reached by the majority in part VI, but I would reach that result by slightly different reasoning.

I.

Again, § 163-278.14A describes the type of evidence necessary to prove that an individual's or organization's communications expressly advocate the election or defeat of a candidate. The first sentence of the provision at issue in this case, § 163-278.14A(a)(2), states that such evidence may include "evidence of financial sponsorship of communications whose essential nature expresses electoral advocacy to the general public and goes beyond a mere discussion of public issues in that they direct voters to take some action to nominate, elect, or defeat a candidate in an election." N.C. Gen. Stat. § 163-278.14A(a)(2) (2002). The second sentence of the

provision goes on to explain that "if the course of action is unclear, contextual factors . . . may be considered in determining whether the action urged could only be interpreted by a reasonable person **[*436]** as advocating the nomination, election, or defeat of that candidate in that election." *Id.* My disagreement with the majority, which strikes down the entire provision, relates only to the first sentence of § 163-278.14A(a)(2). I agree with the majority that only express advocacy can be regulated and that we must look to the language used in the communication, rather than its context, to determine whether it is express advocacy. *See ante* at 1213. Because the second sentence of § 163-278.14A(a)(2) violates this standard, I agree that it must be struck down. The first sentence, however, only applies to communications whose "essential nature . . . directs voters to take some action to nominate, elect, or defeat a candidate in an election." § 163-278.14A(a)(2). Unlike the second sentence, the first does not authorize the regulator to look beyond the text of the communication; specifically, it does not permit the regulator to consider what the communication's effect might be on a reasonable listener.

The first sentence of § 163-278.14A(a)(2) is faithful to the Supreme Court's analysis in *MCFL*. There, MCFL published a flier that described individual candidates' voting records on pro-life issues and urged readers to "VOTE PRO-LIFE," while claiming that the flier did not "represent an endorsement of any particular candidate." *MCFL*, 479 U.S. at 243-44. The Court noted that even though the flier did not use the same language cited in *Buckley*, 424 U.S. at 44 n.52, such

as "Vote for Smith," it was "*in effect* an explicit directive." *MCFL*, 479 U.S. at 249 (emphasis added). In other words, the flier's "essential nature" was not changed just because it avoided using any of the words in Buckley's examples of express advocacy. *Id.*

MCFL thus makes clear that a speaker may engage in express advocacy without using the magic words mentioned in *Buckley*. I acknowledge that § 163-278.14A(a)(1), the North Carolina provision that is *not* under challenge, would cover the sort of express advocacy used by MCFL. However, the phrases and constructions described in § 163-278.14A(a)(1) are examples and are not meant to be an exhaustive list of exhortations that amount to express advocacy. Just as the examples in *Buckley* did not cover the clear message of exhortation in the flier in *MCFL*, so too might there be a communication of express advocacy that does not correspond neatly with the more expansive list of examples in § 163-278.14A(a)(1). For instance, if an organization like MCFL published a sample ballot, clearly marking the boxes next to pro-life candidates and leaving others blank (or striking through other candidates' names), that should fall within the category of express advocacy for the election or defeat of particular candidates. Nevertheless, such an exhortation might not fall within the scope of § 163-278.14A(a)(1) because the exhortation does not include any language listed in that provision or any language that is similar to the examples given. The first sentence of § 163-278.14A(a)(2), however, would cover the sample ballot situation.

NCRL2 v. Leake, 344 F.3d 418 (2003)

The first sentence of § 163-278.14A(a)(2) focuses only on express advocacy. However, rather than defining express advocacy by example or by the use of magic words, it provides an explicative definition. The sentence defines express advocacy as a communication that "goes beyond a mere discussion of public issues in that [it] directs voters to take some action to nominate, elect, or defeat a candidate in an election." § 163-278.14A(a)(2). This definition is consistent with *MCFL*, 479 U.S. at 249 (noting that the flier was express advocacy because it **[*437]** went beyond "mere discussion of public issues" and instead "provided in effect an explicit directive" to vote for certain candidates), and *Buckley*, 424 U.S. at 44 (describing communications "that in express terms advocate the election or defeat of a clearly identified candidate"). Unlike the second sentence of the provision, the first sentence avoids the error of relying on the effect on the speaker or of relying on the broader context in which the communication appears. *See Va. Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379, 391-92 (4th Cir. 2001). The first sentence requires, in other words, that the communication "literally include words which in and of themselves advocate the election or defeat of a candidate," *VSHL*, 263 F.3d at 391 (internal quotations and emphasis omitted), without limiting or detracting from the unchallenged companion provision, § 163-278.14A(a)(1), which defines express advocacy by use of examples. In my opinion, the first sentence of § 163-278.14A(a)(2) is constitutional.

As the majority notes, North Carolina's election laws include a severability provision. N.C. Gen. Stat. § 163-278.5

(2002); *see also ante* at 26 n.6. I would therefore uphold the first sentence of § 163-278.14A(a)(2) but join in the majority's opinion striking down the second sentence of that subsection.

II.

Finally, I concur in the result reached in part VI of the majority's opinion, which concludes that NCRL's challenge to § 163-278.12A, relating to the reporting of expenditures, is moot. I would reach that conclusion by a slightly different path. As the majority notes, our opinion in *Perry v. Bartlett*, 231 F.3d 155, 162 (4th Cir. 2000), states that § 163-278.12A is unconstitutional. Our opinion in *Perry*, however, affirmed the district court's injunction order, which only prohibits North Carolina from enforcing § 163-278.12A against the *Perry* plaintiffs. I do not believe, as does the majority, that the application of the injunction in *Perry* is unlimited. Nevertheless, I agree in the end that NCRL's challenge to § 163-278.12A is moot because North Carolina's brief in this appeal acknowledges that this section is unconstitutional and is not enforceable. *See Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1230-31 (4th Cir. 1989) (finding an issue moot when there was no "reasonable expectation" that the state would seek to enforce the statute in question because the state "con ceded the unconstitutionality of the statute"). I therefore agree with the majority's conclusion that NCRL's challenge to § 163-278.12A is moot.

Judgment filed September 23, 2003, 4th Circuit

JUDGMENT

FILED: September 23, 2003

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

NO. 02-2052

CA-99-798-5-BO

NORTH CAROLINA RIGHT TO LIFE, INCORPORATED; NORTH CAROLINA RIGHT TO LIFE POLITICAL ACTION COMMITTEE; NORTH CAROLINA RIGHT TO LIFE COMMITTEE FUND FOR INDEPENDENT POLITICAL EXPENDITURES

Plaintiffs -Appellees

v.

LARRY LEAKE, in his official capacity as Chairman of the North Carolina State Board of Elections; GENEVIEVE C. SIMS, in her official capacity as Secretary of the State Board of Elections; ROBERT CORDLE, in his official capacity as a member of the State Board of Elections; LORRAINE G. SHINN, in her official capacity as a member of the State Board of Elections; CHARLES WINFREE, in his official capacity as a member of the State Board of Elections; ROBERT F. JOHNSON, in his official capacity a District Attorney for the North Carolina Prosecutorial District 15A; ROY COOPER, in his official capacity as the North Carolina Attorney General

Defendants -Appellants

Judgment filed September 23, 2003, 4th Circuit

NO. 02-2053

CA-99-798-5-BO

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Defendants -Appellees

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Appeal from the United States District Court for the Eastern District of North Carolina at Raleigh

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Judgment filed September 23, 2003, 4th Circuit

In accordance with the written opinion of this Court filed this day, the Court affirms in part and reverses in part the judgment of the District Court.

/s/ Patricia S. Connor
CLERK

Order filed October 24, 2001, E.D.N.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Civil Action No. 5:99-CV-798-BO(3)

NORTH CAROLINA RIGHT TO LIFE, INC., NORTH CAROLINA RIGHT TO LIFE POLITICAL ACTION COMMITTEE, and NORTH CAROLINA RIGHT TO LIFE COMMITTEE FUND FOR INDEPENDENT POLITICAL EXPENDITURES,

Plaintiffs,

v.

LARRY LEAKE, in his official capacity as Chairman of the North Carolina State Board of Elections; GENEVIEVE C. SIMS, in her official capacity as Secretary of the State Board of Elections; ROBERT B. CORDLE, in his official capacity as a Member of the State Board of Elections; LORRAINE G. SHINN, in her official capacity as a Member of the State Board of Elections; CHARLES WINFREE, in his official capacity as a Member of the State Board of Elections; ROBERT F. JOHNSON, in his official capacity as District Attorney for North Carolina Prosecutorial District 15-A; and ROY COOPER, in his official capacity as the North Carolina Attorney General,

Defendants.

Order filed October 24, 2001, E.D.N.C.

ORDER

This case is before the Court on Plaintiffs' and Defendants' cross-Motions for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiffs challenge the constitutionality of several provisions of North Carolina's election laws regulating campaign finance. In accordance with the reasoning laid out below, Plaintiffs' Motion for Summary Judgment will be GRANTED and Defendants' Motion will be DENIED.

BACKGROUND

North Carolina Right to Life, Inc. ("NCRL") is a non-profit corporation incorporated in the State of North Carolina. As set forth in its Articles of Incorporation, NCRL's stated purpose is to gather and disseminate information relating to pro-life issues and to make donations "for the public welfare, or for religious, charitable, scientific or educational purposes," See NCRL Articles of Incorporation, During past election cycles, NCRL has made direct contributions to candidates for state office, VC ¶ 31. During the most recent election cycle, NCRL had the resources and the desire to make direct contributions to candidates and to make independent expenditures (i.e., "express advocacy") totaling over $3,000. However, NCRL did not make any such communications, because it did not want to be deemed a "political action committee" under North Carolina regulations and, as a result, to be subject to the regulations that apply to such committees. See VC ¶ 32 ("as long as these statutes remain enforceable, NCRL will not make such

contributions or expenditures because it does not want to . . . suffer the burdens required of a PAC. . .").

Plaintiff North Carolina Right to Life Political Action Committee ("NCRLPAC") is a political action committee established by NCRL. Plaintiff North Carolina Right to Life Committee Fund for Independent Expenditures ("NCRLC-FIPE") is a political action committee established by NCRL for the sole purpose of making independent expenditures, See VC ¶ 41. NCRL-FIPE makes no contributions of any sort to candidates for public office. NCRL-FIPE would like to solicit contributions from donors in excess of $4,000, in order to fund its independent expenditure activities. However, it may not do so under the current regulations, without opening itself up to criminal liability. See VC ¶¶ 43, 44.

Plaintiffs filed this action on November 30, 1999. On August 10,2000, this Court granted in part and denied in part Plaintiffs' Motion for Preliminary Injunction. Plaintiffs and Defendants have filed cross-Motions for Summary Judgment. The issues have been fully briefed and are ripe for ruling.

ANALYSIS

The Fourth Circuit standard for issuance of a permanent injunction is similar to its standard for issuance ofa preliminary injunction. "'[A] preliminary injunction is an extraordinary remedy, to be granted only if the moving party clearly establishes entitlement to the relief sought." Hughes Network Svs., Inc. v. InterDigital Communications Corp., 17F.3d 691,

693 (4th Cir. 1994) (quoting Federal Leasing, Inc. v. Underwriters at Lloyd's, 650 F.2d 495,499 (4th Cir. 1981)). The standard for awarding interim injunctive relief is the "balance-of-hardships" test. Id. at 196; Direx Israel, Ltd. v. Breakthrough Medical Corp., 952 F.2d 802, 811 (4th Cir. 1991). Under this test, the Court determines whether the harm likely to be suffered by plaintiff if relief is denied is actual and imminent or merely remote and speculative. Direx Israel, Ltd. 952 F.2d at 812 (quoting Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 (2nd Cir. 1989)). It then balances this harm or injury against the harm to the defendant if the relief is granted.

The issue in this case involves a request for permanent injunctive relief. In determining whether permanent injunctive relief is warranted, the Court employs the same hardship-balancing test described above, only it considers Plaintiffs' actual success on the merits, as opposed to the likelihood thereof.

1. N.C. Gen. Stat. § 163-278.6(14)

Plaintiffs first challenge N.C. Gen. Stat. § 163-278.6(14), which sets forth the definition of "political commitee." Under Section 163-278.6(14), a "political committee" is defined as "a combination of two or more individuals . . . that makes, or accepts anything of value to make, contributions or expenditures . . .". N.C. Gen. Stat. § 163-278.6(14). Thus, as an initial matter, a group must first make a contribution or expenditure in order to be deemed a

"political committee." Under N.C. Gen. Stat. § 163-278.6(9), an "expenditure" is defined as "any purchase, advance, conveyance . . ." of "anything of value whatsoever" that is made "to support or oppose the nomination, election, or passage, of one or more clearly identified candidates . . .". N.C. Gen. Stat. § 163-278.6(9).

In order to determine whether a purchase or advance is made "to support or oppose" a candidate's election, and thus qualifies as an "expenditure," North Carolina's regulations apply an "express advocacy" test. The express advocacy test, set forth at N.C. Gen. Stat. § 163- 278.14A, provides for two ways in which a communication may be deemed to "support or oppose" a candidate. The first method mirrors the "express advocacy" test that was set forth in Buckley and has since been vigorously applied by the Fourth Circuit. See Buckley, 424 U.S. at 80; Virginia Society for Human Life, Inc. v. Federal Election Comm'n, 263 F.3d 379, 390-92 (4th Cir. 2001) [hereinafter VSHL], Perry v. Bartlett, 231 F.3d 155, 160-61 (4th Cir. 2000); Federal Election Comm'n v. Christian Action Network. Inc., 110 F.3d 1049, 1051 (4th Cir. 1997). That is, under N.C. Gen. Stat. § 163-278. 14A(a)(1), a communication qualifies as "express advocacy," and is therefore an "expenditure," if it includes certain words or phrases such as "vote for," "cast your ballot for," "defeat," etc. See N.C. Gen. Stat §163-278.14A(a)(1).

The second method, however, does not limit the scope of "express advocacy" to communications that literally include words that, in and of themselves, advocate the election or

defeat of a candidate, as was required in Buckley. See Buckley, 424 U.S. at 44 n. 52; see also VSHL, 263 F .3d at 391. Instead, it defines a communication as "express advocacy" if its "essential nature" expresses electoral advocacy and "goes beyond a mere discussion of public issues in that they direct voters to take some action to . . . elect a candidate in an election." N.C. Gen. Stat. § 163-278.14A(a)(2). While the requirement that a communication "direct voters to take some action" might appear simply to reiterate Buckley's requirement that the communication contain express words of advocacy, the Statute in fact goes beyond Buckley.

Specifically, it provides that where the "course of action" of a communication is unclear, contextual factors such as the "language of the communication as a whole, the timing of the communication in relation to events of the day, the distribution of the communication to a significant number of registered voters for that candidate's election, and the cost of the communication," may be used in order to determine whether the communication "could only be interpreted by a reasonable person as advocating the nomination, election, or defeat of that candidate in that election." N.C. Gen. Stat. § 163-278.14A(a)(2). Once a communication is deemed "express advocacy" under this contextually-based "reasonable person" standard, it will be considered to "support" or "oppose" a candidate under N.C. Gen. Stat. § 163-278.6(9), and will thus qualify as an "expenditure" for purposes of determining "political committee" status under N.C. Gen. Stat. § 163-278.6(14).

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The second requirement for designation as a "political committee," in addition to the contribution or expenditure requirement, is that a group qualify as one of the following: (1) a candidate-controlled organization; (2) a political party (or a group that is controlled by a political party, etc.); (3) an organization created by a corporation, business entity, union, etc.; or (4) a group that has as "a major purpose to support or oppose the nomination or election of one or more clearly identified candidates." N.C. Gen. Stat. § 163-278.6(14)(d) (emphasis added). North Carolina's "major purpose" determination is based upon the amount of contributions and expenditures made by a group during an election cycle. Specifically, if a group makes a total of more than $3,000 in expenditures and/or contributions during an election cycle, it is presumed to have as a "major purpose" the election or defeat of a candidate. Id. Although this presumption is rebuttable, it may only be rebutted by a "showing that the contributions and expenditures . . . were not a major part of the activities of the organization during the election cycle." Id. Because the rebuttable presumption arises based on the amount of a group's contributions and/or independent expenditures, as defined under N.C. Gen. Stat. § 163-278.14A, a group's "major purpose" may be derived with the help of the contextual factors set forth at N.C. Gen. Stat. § 163-278.14A(a)(2), simply because the level of its "expenditures" may be determined based on such factors.

Designation as a "political committee" has broad implications for the First Amendment rights of the committees themselves, as well as for the individuals that belong to and

contribute to them. All organizations that are deemed "political committees" under the Statute become subject to various administrative and organizational requirements. For instance, under N.C. Gen. Stat. § 163-278.7, a political committee must register with the State and appoint a treasurer. Political committees are also required to keep track of and to report the dates and amounts of all of their expenditures and contributions. See N.C. Gen. Stat. §§§ 163-278.8, 163-278.9, 163- 278.11. Whenever they receive a contribution of more than $100, political cc .nmittees must disclose the donor's name, address and occupation. Moreover, any organization that is found to have violated these requirements may be subject to prosecution for a class-2 misdemeanor, as well as civil late-filing fines. N.C. Gen. Stat. §§ 163-278.27, 163-278.34.

Plaintiffs argue that Section 163-278.6(14) is unconstitutional on a number of bases. Among the arguments that Plaintiffs make are claims that the Statute is unconstitutional because: (1) it regulates groups whose "major purpose" is not to elect or defeat a candidate; (2) it creates a "conclusive presumption" that amounts to an unconstitutional restraint on speech; and (3) it is unconstitutionally vague. However meritorious these arguments may be, they need not be reached in order to resolve this case, because the Court fmds the Statute unconstitutional on the basis that it impermissibly regulates issue advocacy.

As discussed above, under North Carolina's regime, an entity is subject to a rebuttable presumption that it is a "political committee" if the total amount of its expenditures

and contributions exceeds $3,000. Moreover, North Carolina's definition of "expenditure" is not limited to what Buckley and MCFL clearly define as "express advocacy," i.e., it does not limit the scope of ' 'express advocacy" to include only "clear words that 'directly fit the term ['express advocacy'], 'such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject, "". VSHL, 263 F .3d at 392 (noting that Buckley and MCFL limit "express advocacy" to "clear words" such as those listed). That is, under North Carolina's regulations, even if a communication contains no express words of support or defeat, it may qualify as an "expenditure" made "in support of' or "against" the candidacy of a particular person, so long as its "essential nature" is express electoral advocacy, based on a "reasonable person" standard that takes into consideration various contextual factors, including the timing of the communication, its distribution, as well as its language "as a whole." See N.C. Gen. Stat. § 163-278.14A(a)(2).

In his deposition testimony, Gary Bartlett, Executive Secretary and Director of the State Board of Elections, described the circumstances under which the contextual factors might be taken into account. He emphasized that contextual factors would not always be taken into account, and that "when [the Board] look[s] at something initially, the first thing [it would] do [would be] to look to see if it is express advocacy or not express advocacy", presumably using the "for or against", "support or defeat" or "elect or not elect" words. Bartlett Dep. at 38. However, he did admit that, even in certain cases in which no such "express words of advocacy" were present, the

Board might nonetheless fmd that a communication constituted express advocacy if its essential nature was unclear. He stated that "it is the cumulative whole that lets you use [Subsection (a)(2)] or not. ..[including] the timing, the amount of money spent in a specific period of time . . .". Id.

In fact, the State Board of Elections made one such "political committee" determination in the case of Community Alliance for a Responsible Environment v. Leake, No. 5:00-CY-554- BO(3) (E.D.N.C. March 13,2001) [hereinafter "CARE"]. In CARE, a group that had engaged in no express advocacy was nonetheless deemed a "political committee" and subject to regulation as a "political committee" under N.C. Gen. Stat. § 163-278.6(14). Based on a number of contextual factors, including the volume of the communications made by CARE, and their proximity in time to a local election, the State Board of Elections determined that a "major purpose" of CARE was to make "expenditures." Because CARE had engaged solely in issue advocacy, however, under the standards set forth in Buckley, this Court held that it was unconstitutional to regulate CARE as a "political committee" and that the Statute was thus unconstitutional as applied to CARE.

For the same reasons that were discussed in CARE, Section 1 63-278. 14 clearly violates the "express advocacy" test as set forth by the Supreme Court in Buckley. In Buckley the Supreme Court set forth two major propositions that are relevant to the instant discussion. The first is that, as a general matter, political expression may only be regulated to the extent that it constitutes "express" advocacy, as opposed to pure

"issue advocacy," which is not regulable. See Buckley v. Valeo, 424 U.S. 1,80 (1976) (limiting the reach of limitations on expenditures only to "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate"). See also Federal Election Comm'n v. Massachusetts Citizens for Life. Inc., 479 U.S. 238, 249 (1986) ("an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b") [hereinafter MCEL]; Virginia Society for Human Life v. Federal Election Comm'n., 263 F.3d 379, 385 (4th Cir. 2001) (reiterating that "'issue discussions,' ...are plainly protected from regulation by the First Amendment.") [hereinafter VSHL]; Perry: v. Bartlett, 231 F.3d 155, 160 (4th Cir. 2000) (emphasizing that the "bright-line rule" that determines when political expression may be regulated "requires the use of express or explicit words of advocacy of the election or defeat of a candidate . . .").

The second important holding in Buckley applicable in the instant case, is that an organization may be regulated as a "political committee," and subject to the organizational and reporting requirements often applied to such committees, only if it has as a "major purpose" the election or defeat of a candidate. See Buckley, 424 U.S. at 79. See also MCFL, 479 U.S. at 262 ("Furthermore, should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee."). As the Fourth Circuit noted in North Carolina Riszht to Life. Inc. v. Bartlett, 168 F.3d 705, 712 (4th Cir. 1999) (emphasis in original), "the [Buckley] Court defined political committee as including only

those entities that have as a major purpose engaging in express advocacy in support of a candidate, by using words such as 'vote for,' 'elect,' 'support,' 'vote against,' 'defeat,' or 'reject' . . .".

In this case, rather than applying the "major purpose" test set forth at Buckley, the North Carolina regulations employ a much broader test. Under North Carolina's regulations, an organization that has never engaged in any express advocacy (but, has made what the "reasonable person" might consider to be "independent expenditures" when certain contextual factors are taken into account), may nonetheless be deemed a "political committee" which has as a "major purpose" the nomination, election, or defeat of a candidate. This regime impermissibly regulates pure issue advocacy and cannot stand.

Moreover, Defendants' argument that the State Board has never contended that NCRL must register as a political committee under the "political committee" definition is immaterial. So long as the plain language of the Statute allows certain organizations engaged solely in "issue advocacy" to qualify as "political committees," Plaintiffs, as well as any other organizations that may want to spend funds on issue-advocacy communications that might be incorrectly deemed "express advocacy" under the Statute[1], will be discouraged

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[1] Examples of communication that may be unconstitutionally deemed "express advocacy" under the Statute, but which, under the Buckley decision, is not "express advocacy", include any communications that do not include words such as "vote for," "vote against," etc., but which

from exercising their valid and important First Amendment Rights.[2] Neither NCRL, nor any other such group, "has [any] guarantee that the Board might not tomorrow bring its interpretation more in line with the provision's plain language." North Carolina Right to Life v. Bartlett, 168 F .3d 705, 711 (4th Cir. 1999) [hereinafter NCRL I]. For these reasons, the Court rejects Defendants' argument that Plaintiffs lack standing to bring the instant challenge, or that their claims are not ripe for adjudication. See also North Carolina Right to Life v. Leake, No. 5:99-CY-798-BO(3) at 8-9 (E.D.N.C. August 10,2001).

Accordingly,Section 163-278. 14A(a)(2), which allows "contextual factors" to determine whether a communication is "express advocacy," as well as Section 163-278.6(14), which incorporates the overly-broad "express advocacy" standard in making a "major purpose" determination, are unconstitutional. Plaintiffs are therefore entitled to injunctive relief from enforcement of these Statutes.

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nonetheless may be construed as "essentially" expressing electoral advocacy, when the contextual factors described at N.C. Gen. Stat. § 163-278. 14A(a)(2). are taken into account.

[2] As was the case in NCRL I, nothing in the record indicates that the Board has exempted so-called "issue advocacy" organizations from its definition of political committee, or that local district attorneys will refrain from prosecuting such organizations, which, under the terms of the Statute, may have violated the reporting requirements. *See* NCRL I at 710-11.

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2. N.C. Gen. Stat. § 163-278.12A

Section 163-278.12A was held to be unconstitutional under Perry v. Bartlett, 231 F.3d 153, thus rendering moot Plaintiffs' instant challenge to the Statute.

3. N.C. Gen. Stat. § 163-278.39(a)(3)

Section 163-278.39(a)(3) was recently repealed, *see* Session Law 2001-353, thus rendering moot Plaintiffs' instant challenge to the Statute.

4. Section 163-278.13

Plaintiffs' final objection is to N.C. Gen. Stat. § 163-278.13, which provides that no individual may contribute to any political committee (or candidate) in excess of $4,000 during any single election cycle. This contribution limitation applies with equal force to contributions made to "independent expenditure political committees,"[3] i.e., committees that only make independent expenditures, see N.C. Gen. Stat. § 163-278.6(9a) (defining "independent expenditure" as an expenditure "that is made without consultation or coordination

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[3] An "independent expenditure political committee" ("IEPC") is defined as a political committee that only makes independent expenditures. Thus, IEPCs make only expenditures, and all of their expenditures are made "independent" of any candidate. *See* N.C. Gen. Stat. § 163-278.6(9a) (defining "independent expenditure").

with a candidate or agent of a candidate . . ."), as well as to contributions made to political committees that make campaign contributions, coordinated expenditures, etc. Plaintiff NCRLFIPE objects to the Statute only insofar as it imposes a limitation on contributions to independent expenditure political committees, on the basis that the State has an insufficient interest to support such a limitation on speech.

4(a) Standard of scrutiny

In Buckley v. Valeo, the Supreme Court drew a line between the standard of scrutiny to be applied to limitations on contributions and that which applies to limitations on independent expenditures. Buckley's contribution-expenditure distinction was initially made in the context of limitations on contributions to and on behalf of candidates or their political committees. Examining the federal limitation applicable to direct contributions to candidates, the Court noted that such a limitation "involves little direct restraint on . . . political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates issues." Buckley, at 21.[4] The Court did recognize, however, that the

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[4] At least initially, the Supreme Court did not apply this lesser level of scrutiny to all types of contributions, irrespective of the nature of the contribution or its destination. For instance, in Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 US 290 (1981), the Court considered an ordinance that limited the amount of

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contributions that individuals could make to committees formed to support or oppose ballot measures. In that context, the Court emphasized that the "practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." Id. at 294. The Court also stressed that "the freedom of association 'is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally' effective.'" *Id.* at 297. Accordingly, it noted that the contribution limitation was a "regulation of First Amendment rights [which are] always subject to exacting judicial scrutiny." Id. at 298 (emphasis added).

However, in Nixon v. Shrink Missouri Government PAC, the Supreme Court appears to have widened the scope of contributions to which courts should apply the "lesser" standard of scrutiny articulated in Buckley. The Nixon Court emphasized that the so-called "associational" rights implicated by political contributions are less hampered by limitations than are the associational rights that are exercised by those who engage in independent spending. The Court stated that "[w]hile we did not [in Buckley] say in so many words that different standards might govern expenditure and contribution limits affecting associational rights, we have since then said so explicitly in Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.", Shrink Missouri, 120 S.Ct. at 904 (citation omitted). On the basis of that reasoning, the Court applied "Buckley's standard of scrutiny" and concluded that a limitation on a contribution to a political action committee "involving 'significant interference' with associational rights, could survive if the Government demonstrated that contribution regulation was 'closely drawn' to match a 'sufficiently important

limitation was a "'significant interference' with protected rights . . . " . Id. at 25. Thus, the Court applied a somewhat lesser standard of scrutiny than the "compelling interest" standard, and upheld the contribution restriction on the basis that it was "closely drawn" to address the State's "sufficiently important interest." Id. at 25.

In Shrink Missouri, the Supreme Court applied the somewhat less-scrutinizing "Buckley's standard of scrutiny" to limitations on contributions to political action committees. Because the First Amendment rights at issue in this case, as well as the corresponding infringements of those rights, are nearly identical to those at issue in Shrink Missouri, this Court will follow Shrink Missouri and will apply "Buckley's standard of scrutiny" to the contribution limitations imposed on independent expenditure committees under Section 163-278.13. North Carolina's $4,000 limitation on contributions to independent expenditure committees will therefore be upheld only if it is "closely-drawn" to address a "sufficiently important interest" of the State.

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interest,' though the dollar amount of the limit need not be 'fine tun[ed],'". Shrink Missouri, 120 S.Ct. at 904 (internal citations omitted).

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4(b). Application of "Buckley's Standard of Scrutiny" to Limitations on Contributions to IEPCs

Defendants argue that they have a "sufficiently important interest" in limiting corruption in the political process, and that this interest justifies the limitation on contributions to IEPCs. Indeed, it is well-established that the prevention of corruption, or the appearance of corruption, in the electoral process is a "sufficiently important" and even compelling interest. See Buckley, 424 U.S. at 26-27. See also Federal Election Comm'n v. Colorado Republican Federal Campaign Committee, 121 S.Ct. 2351, 2366 (2001) ("we have recognized [the government interest in combating political corruption] as . . . "sufficiently important" . . ."). Defendants' remaining hurdle, however, is to establish that the limitation on contributions to IEPCs in fact addresses the State's interest in preventing corruption or appearance of corruption, and whether it is "closely-drawn" to avoid unnecessary abridgment of First Amendment freedoms.

Defendants claim that limiting contributions to IEPCs curbs corruption because the expenditures ultimately made by the IEPCs have a potentially corruptive (or apparently corruptive) effect on candidates.[5] See Memo. In Supp. at 19.

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[5] Defendants do not claim that all contributions to political committees are inherently corruptive in and of themselves. Nor could they be, since there is no finding in the law that contributions to political committees, regardless of

Specifically, Defendants claim that, "[e]ven though such expenditures [made by IEPCs] are not coordinated with the candidate or his campaign staff, the candidate could not fail to feel the impact of large expenditures either for or against him." Id.

To bolster their argument that contributions to IEPCs pose a threat of corruption, Defendants rely heavily on the Supreme Court's reasoning in Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000) [hereinafter Shrink Missouri], in which the Supreme Court upheld the State of Missouri's limitations on contributions to political candidates. In Shrink Missouri, the Supreme Court emphasized that the legitimate concern in preventing corruption is "not confined to bribery of public officials, but extend[s] to the broader threat from politicians too compliant with the wishes of large contributors." Id. at 389. On that basis, Defendants apparently claim that the contributions to IEPCs should be limited because the independent expenditures made by IEPCs "could have a corrupting effect . . . [e]ven though such expenditures are not coordinated with the candidate or his campaign staff." Memo. In Supp. at 19.

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amount, in the absence of later expenditure, lead to corruption or the appearance of corruption. Because all of the funds contributed to IEPCs are ultimately used to make independent expenditures, in order to show that such contributions are corruptive, Defendants must demonstrate that independent expenditures, in fact, have a corruptive effect, and this they have not done.

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Plaintiffs, for their part, readily admit that contributions to candidates implicate the State's interest in preventing quid pro quo corruption, or even undue influence on candidates, and may therefore be limited. Plaintiffs further recognize that coordinated expenditures, which are made in coordination with a candidate or her staff, may be justified by the State's interest in preventing corruption. See Memo. In Supp. at 45. Plaintiffs contend, however, that the State does not have a sufficiently important interest in limiting contributions when such contributionsare made to independent expenditure committees, simply because such independent expenditure committees are engaged sōlely in advocacy that is done "without consultation or coordination with a candidate or agent of a candidate." See N.C. Gen. Stat. § 163-278.6(9a) (defining "independent expenditure"). They claim that the contributions at issue in this case involve none of the dangers that are engendered by campaign activities such as the making of coordinated expenditures, see Federal Election Comm'n v. Colorado Republican Federal Campaign Committee, 121 S.Ct. 2351, 2371 (finding that "[c]oordinated expenditures . . . are tailor-made to undermine contribution limits" and therefore encourage corruption), or of direct contributions to candidates, see Buckley, 424 U.S. at 26-27 (stating that "large contributions" tend to "undermine" the integrity of the political system, "[t]o the extent that [they] are given to secure a political quid pro quo from . . . office holders . . .").

This Court agrees with Plaintiffs. By definition, independent expenditures are uncoordinated with and independent of any particular candidate. See Buckley, 424 U.S.

at 47 (stating that independent expenditures, as similarly defined under the FECA, are made "totally independently of the candidate and his campaign"). See also N.C. Gen. Stat. § 163-278.6(9a). The fact that IEPCs make their expenditures in an independent and uncoordinated fashion thus mitigates the danger that they might yield improper political influence or tend to precipitate a political quid pro quo. See Buckley, 424 U.S. at 47 ("[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate . . . [and] alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."). As the Supreme Court noted in Buckley, the "independent" nature of such expenditures "may well [render them of] little assistance to the candidate's campaign and indeed may prove counterproductive." Id.

Although the instant case involves a restriction on contributions, a form of expression that "involves speech by someone other than the contributor . . .", Buckley, 424 U.S. at 21, Supreme Court precedent is clear that such a limitation is a "significant interference with associational rights" and must therefore be "closely drawn" to address a "sufficiently important" governmental interest. See Buckley, 424 U.S. at 25, Nixon v. Shrink Missouri Government PAC, 120 S.Ct. 897,904 (2000).

The only such interest proffered by Defendants in this case is the State's interest in preventing corruption. Although Defendants have relied on Buckley to demonstrate the well-

accepted proposition that contributions to candidates have a tendency to corrupt, Def. Resp. at 23 ("'Buckley demonstrates that . . . the suspicion that large contributions are corrupt [is] neither novel nor implausible'"), Defendants have failed to address the important distinction in the instant case, which is that N.C. Gen. Stat. § 163-278.13, unlike the regulation at issue in Buckley limits contributions to political committees that engage solely in making independent expenditures. By definition, the contributions at issue in this case are ultimately used by a political committee to make independent expenditures (or not used at all). In order for the Statute to be constitutionally applied to contributions made to IEPCs, therefore, Defendants must demonstrate that the independent expenditures made by political committees pose a danger of corruption.

In determining whether the independent expenditures of IEPCs are potentially "corruptive," here, as in Colorado Republican Federal Campaign Committee v. Federal Election Commission, 518 U.S. 604, 618 (1996) [hereinafter Colorado I), the "constitutionally significant fact . . . is the lack of coordination between the candidate and the source of the expenditure," i.e., the IEPCs or their contributors. In Colorado I, the Supreme Court struck down limitations on independent expenditures made by political parties. In so doing, the Court held that the fact that a political party's independent expenditures were not coordinated with a candidate prevents the "assum[ption], absent convincing evidence to the contrary, that a limitation on political parties' independent expenditures

is necessary to combat a substantial danger of corruption of the electoral system." Id.

In another related case, Federal Election Comm'n v. National Conservative Political Action Committee et al., 470 U.S. 480 (1985) (hereinfater NCPAC], the Supreme Court held unconstitutional a federal limitation on independent expenditures made by PACs and other organizations. The Supreme Court found that, although independent expenditures made by PACs may influence elected officials, such influence is not "corruptive." Specifically, it noted that "[t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by . . . P ACs can hardly be called corruption . . .". See id. at 498. The Court reiterated that "[t]he hallmark of corruption is the financial quid pro quo," but noted that the absence of coordination between a candidate and the PAC making such independent expenditures "alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." Id. at 498.[6]

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[6] The Supreme Court did note that the PACs at issue in NCPAC received "overwhelmingly small contributions," and intimated that independent expenditures made by "multimillion dollar war chests" might create a different danger, insofar as the risk of corruption of PAC-made independent expenditures is concerned. While this might, at first blush, seem to indicate that independent expenditures made by IEPCs receiving unlimited contributions might pose a greater danger of corruption than those made by IEPCs

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Similarly, in this case, the corruptive threat of independent expenditures made by IEPCs and, by extension, the contributions made for such purpose, is clearly mitigated by the lack of coordination between candidates and the IEPCs or, for that matter, the contributors to the IEPCs. Moreover, Defendants' only evidentiary support for their claim that the IEPCs' independent expenditures may be corruptive fails to refute a finding that the threat of corruption is mitigated in this case, given the lack of coordination between the IEPCs making

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receiving only limited contributions, the NCPAC Court did not, in fact, conclude that allowing unlimited contributions to PACs would create a danger of corruption, as far as their independent expenditures were concerned. Indeed, the Court's holding was not based on the fact that the PACs at issue received only limited contributions. Instead, the Court's holding ultimately turned on the fact that there, as here, "contributions [to PACs] [we]re by definition not coordinated with the campaign of the candidate," NCPAC, 470 U.S. at 497, and that the independent expenditures made by PACs (or IEPCs) were not prearranaged or coordinated with candidates. Both of these factors "alleviated the danger that expenditures w[ould] be given as a quid pro quo for improper commitments from the candidate." Id. at 498. The danger of independent expenditures made by political committees having been mitigated, "precisely what the 'corruption'" in contributions to IEPCs "may consist of [the Supreme Court was] never told with assurance . . .". Id. Similarly, in this case, the Court has not been informed of what corruption the IEPCs' independent expenditures (and, by extension, the contributions to IEPCs) might have. Nor is this Court able to ascertain any such danger of corruption.

the independent expenditures (or the contributors to the IEPCs) and the candidates whom they may support or oppose.

Defendants' strongest evidence that IEPCs' independent expenditures may be corruptive is the testimony of Robert H. Hall,[7] who claims that "Farmers for Fairness," an issue-advocacy group in North Carolina, "threatened the legislative leadership that it would run advertisements" in "retaliation for votes against the hog industry in North Carolina." Response at 24. Defendants claim that this supports a finding that allowing unlimited contributions to committees that will run such advertisements will encourage "corruption." However, in Perry

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[7] Robert Hall does make the blanket statement that "independent expenditure activity actually can have a corrupting influence on candidates" and that "[t]here is not as clean a divide between an independent expenditure having no potential for corrupting a candidate whose election it is intended to influence . . .". Hall Dep. at 81. However, in the very same deposition, Hall admits that, despite the fact that he did a research report on the topic, he "c[ould]n't recall" a single example of a candidate who had been improperly influenced by an independent expenditure made without coordination with the candidate. Hall Dep. at 32-33. Moreover, if it were, in fact, true that spending became coordinated with candidates, it would then be "coordinated expenditures" and would be treated as contributions to candidates, rather than "independent expenditures" under applicable regulations. See N.C. Gen. Stat. § 163-278.6(9a) (defining "independent expenditure" to be an expenditure made "without consultation or coordination with a candidate or agent of a candidate) (emphasis added).

v. Bartlett, the Fourth Circuit determined that the Farmers for Fairness group engaged solely in "issue advocacy," which is speech that is afforded the "broadest protection" under the First Amendment. Perry v. Bartlett, 231 F.3d 155,158-59 (4th Cir. 2000) ("While Farmers does make expenditures that may incidentally influence . . . an election, it does not in explicit words . . . advocate the election or defeat of a candidate."). Therefore, the Fourth Circuit held that the actions of Farmers for Fairness were not "corruptive," but, rather, constituted protected speech under the First Amendment.

Defendants also submit the testimony of State Senator Gulley, who claims to have noticed a growing number of independent expenditures in state and local campaigns. See Memo. In Supp. at 19. According to his deposition testimony, Gulley "gets the sense that . . . the large monied interests will begin turning more and more to both independent expenditures and to issue-so-called 'issued' ads, political advocacy masquerading as issue ads, as ways to try and influence elections and have a very corrosive effect upon the democratic process." Dep. At 117. Defendants apparently argue, on the basis of Gulley's testimony, that lifting the $4,000-limitation applied to contributions to IEPCs would facilitate an increase in such independent expenditures and, in turn, would encourage corruption. Unfortunately for Defendants, however, neither an increase in independent expenditures (i.e., express advocacy), nor an increase in expenditures on issue advocacy

would be considered "corruptive" under the standards issued in Buckley.[8]

Defendants have thus failed to present any evidence that independent expenditures made by IEPCs have a tendency to corrupt or create an appearance of corruption. Moreover, IEPCs, by definition, engage solely in making independent expenditures.[9] Therefore, by extension, there is no evidence

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[8] As noted in Buckley, the uncoordinated nature of independent expenditures mitigates the danger that such expenditures may have a corruptive influence. Also as noted by the Buckley Court, issue advocacy is among the most highly-protected forms of advocacy and cannot be subject to limitation.

[9] The Court notes that, were it not the case that IEPCs engaged solely in making independent expenditures, the outcome of the instant challenge would be quite different. The Supreme Court's holding in California Medical Ass'n v. Federal Election Comm'n, 453 U.S. 182, 198-99 (1981) is instructive on this point. In California Medical, the Supreme Court upheld a limitation on contributions to multicandidate political committees, which, at first blush, is quite similar to the limitation at issue in this case. However, the material difference between the FECA limitation at issue in California Medical and North Carolina's limitation at issue in this case is that the FECA limitation applied to multicandidate political committees, as opposed to Independent Expenditure Political Committees. By definition, multicandidate political committees made contributions directly to candidates. As the Supreme Court noted in California Medical, if limitations on contributions to

that the contributions, which directly fund the IEPCs' independent expenditures, have any significant tendency to corrupt.[10] On this record, as on the record in FEC v. NCP AC,

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multicandidate political committees were struck down, therefore, "the contribution limitations [on contributions to candidates or on aggregate annual contributions to candidates] could easily be evaded." See California Medical, 453 U.S. at 198. In that case, it was thus "clear that th[e] [limitation on contributions to multicandidate political committees] [wa]s an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld . . . in Buckley." Id. at 199. However, because Independent Expenditure Political Committees, by definition, make only independent expenditures (and make no contributions, coordinated expenditures, etc.), no such danger of evasion of the State's limitations on direct contributions to candidates is at issue in this case.

[10] Given that existing law precludes individuals to make unlimited contributions to independent expenditure political committees, Defendants were limited to presenting evidence of "corruption" done by committees that had received only limited (i.e., under $4,000) contributions. In the event that independent expenditures made by committees receiving unlimited funds were materially different than independent expenditures made by committees receiving limited contributions, the proffered evidence would allow the Court to draw only limited conclusions about the corruptive nature of independent expenditures made by committees receiving unlimited contributions. However, Defendants have presented no evidence to support that the independent expenditures made by political committees that receive unlimited contributions

"such an exchange of political favors for [contributions to political committees that make only] uncoordinated expenditures remains a hypothetical possibility and nothing more." NCP AC, 470 U.S. at 498.

Having found that the limitation on contributions to IEPCs does not address the State's interest in preventing corruption of the political process, and Defendants having presented no alternative justification for the limitation at issue in this case, this Court is unable to determine that any sufficiently important interest justifies the limitation.

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would have any more of a corruptive effect than those made by political committees that receive only limited contributions. After all, the "constitutionally significant fact," which remains the same whether contributions to IEPs are limited or unlimited, is that "contributions [to PACs] are by definition not coordinated with the campaign of the candidate," NCPAC, 470 U.S. at 497, and that the independent expenditures made by PACs (or IEPCs) are, by definition, independent and are not prearranaged or coordinated with candidates. See Colorado Republican Federal Campaign Committee v. Federal Election Commission, 518 U.S. 604, 618 (1996) (stating that the "constitutionally significant fact . . . is the lack of coordination between the candidate and the source of the expenditure,"). As discussed above, both of these factors "alleviate[] the danger that expenditures w[ould] be given as a quid pro quo for improper commitments from the candidate." Id. at 498. Therefore, there is no reason to believe that the danger of corruption of independent expenditures made by PACs should vary with the size of contributions that they receive.

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Following the direction of the Supreme Court, this Court must "never accept[] mere conjecture as adequate to carry a First Amendment burden . . .". Shrink Missouri, at 907. Therefore, this Court finds that the limitation on contributions to political committees set forth at N.C. Gen. Stat. § 163-278.13 is unconstitutional as applied to NCRL-FIPE, as well as to all political committees that engage solely in making independent expenditures.

CONCLUSION

For all of the foregoing reasons, the Court finds N.C. Gen. Stat. § 163-278.6(14) and N.C. Gen. Stat § 163-278.14A(a)(2) unconstitutional and N.C. Gen. Stat. § 163-278.13 unconstitutional as applied to Plaintiff NCRL-FIPE, and other political committees that only make independent expenditures. The Court further concludes that Plaintiffs are entitled to injunctive relief as to their challenges to N.C. Gen. Stat. § 163-278.6(14), N.C. Gen. Stat § 163- 278.14A(a)(2), and N.C. Gen. Stat. § 163-278.13. Defendants are hereby ENJOINED from relying on, enforcing or prosecuting violations of Sections 163-278.6(14), 163-278.14A(a)(2) as against Plaintiffs and others similarly situated, and are similarly ENJOINED from relying on, enforcing or prosecuting violations of Section 163-278.13 as against NCRL-FIPE, so long as NCRL-FIPE remains an IEPC and engages solely in making independent expenditures. Plaintiffs' Motion for Summary Judgment is hereby GRANTED.

SO ORDERED.

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This 24th day of October, 2001.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE

Judgment filed October 24, 2001, E.D.N.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Civil Action No. 5:99-CV-798-BO(3)

NORTH CAROLINA RIGHT TO LIFE, INC., NORTH CAROLINA RIGHT TO LIFE POLITICAL ACTION COMMITTEE, and NORTH CAROLINA RIGHT TO LIFE COMMITTEE FUND FOR INDEPENDENT POLITICAL EXPENDITURES,

Plaintiffs,

v.

LARRY LEAKE, in his official capacity as Chairman of the North Carolina State Board of Elections; GENEVIEVE C. SIMS, in her official capacity as Secretary of the State Board of Elections; ROBERT B. CORDLE, in his official capacity as a Member of the State Board of Elections; LORRAINE G. SHINN, in her official capacity as a Member of the State Board of Elections; CHARLES WINFREE, in his official capacity as a Member of the State Board of Elections; ROBERT F. JOHNSON, in his official capacity as District Attorney for North Carolina Prosecutorial District 15-A; and ROY
COOPER, in his official capacity as the North Carolina Attorney General,

Defendants.

JUDGMENT
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Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for Summary Judgment is hereby GRANTED. (Boyle, J)

THIS JUDGMENT FILED AND ENTERED ON OCTOBER 24.2001 AND COPIES TO:

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October 24,2001

DAVID W. DANIEL, CLERK

/s/ Sue A Towe

(By) Deputy Clerk

Order filed August 8, 2002, E.D.N.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Civil Action No. 5:99-CV-798-BO(3)

NORTH CAROLINA RIGHT TO LIFE, INC., NORTH CAROLINA RIGHT TO LIFE POLITICAL ACTION COMMITTEE, and NORTH CAROLINA RIGHT TO LIFE COMMITTEE FUND FOR INDEPENDENT POLITICAL EXPENDITURES,

Plaintiffs,

v.

LARRY LEAKE, in his official capacity as Chairman of the North Carolina State Board of Elections; GENEVIEVE C. SIMS, in her official capacity as Secretary of the State Board of Elections; ROBERT B. CORDLE, in his official capacity as a Member of the State Board of Elections; LORRAINE G. SHINN, in her official capacity as a Member of the State Board of Elections; CHARLES WINFREE, in his official capacity as a Member of the State Board of Elections; ROBERT F. JOHNSON, in his official capacity as District Attorney for North Carolina Prosecutorial District 15-A; and ROY COOPER, in his official capacity as the North Carolina Attorney General,

Defendants.

Order filed August 8, 2002, E.D.N.C.

ORDER

This case is before the Court on Plaintiffs' and Defendants' Motions to Alter or Amend Judgment. filed pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. In the underlying action. Plaintiffs challenged the constitutionality of several provisions of North Carolina's election laws regulating campaign finance. On October 24, 2001, this Court granted Plaintiffs' Motion for Summary Judgment as to their claims that various state election laws unconstitutionally infringed their free speech rights. For the following reasons, however, the Court finds it proper to amend its earlier judgment, in particular, with respect to the Court's ruling as to the constitutionality of N.C. Gen. Stat. § 163-278.6(14).

Although the Court maintains that Section 163-278.6(14) is unconstitutional in its present form, the Court also finds that, in light of clear legislative intent, the appropriate action is to sever the unconstitutionally infirm standard for "express advocacy" that is incorporated into the Statute. Specifically, the Court will sever Section 163-278.14A(a)(2) from the "expenditure" and "major purpose" determinations set forth under Section 163-278.6(14), so that the overly-broad standard under Section 163-278. 14A(a)(2) is inapplicable to a determination of what entities qualify as "political committees" under Section 163-278.6(14). This Court finds that, absent incorporation of the unconstitutional "express advocacy" standard, N.C. Gen. Stat. § 163- 278.6(14) cannot be deemed an unconstitutional infringement of Plaintiffs' First

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Amendment rights. Having excised the offending "express advocacy" standard, the Court will thus leave the balance of Section 163-278.6(14) intact. For the following reasons, therefore, Defendants' Motion to Alter or Amend Judgment is GRANTED, and Plaintiffs' Motion to Alter or Amend Judgment is DENIED.

ANALYSIS

Rule 59(e) provides that a party may move a court to alter or amend a judgment within ten days after entry of such judgment. Fed. R. Civ. P. 59(e). Although Rule 59(e) itself does not provide a standard under which such a motion may be granted, the Fourth Circuit has recognized three grounds for modifying an earlier judgment: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." EEOC v. Lockheed Martin Corp.., 116 F .3d 110, 112 (4th Cir. 1997). Both Plaintiffs and Defendants appear to have brought their respective Motions to Amend on the basis of the third standard.

1. Defendants' Motion to Alter or Amend Judgment

Defendants have moved to alter the Court's previous judgment as it applies to N.C. Gen. Stat. § 163-278.6(14). Section 163-278.6(14) is the North Carolina statute that provides for a definition of "political committee. "As the Court stated in its previous Order, such definition has important. First Amendment implications, insofar as political committees are

subject to significant reporting and administrative requirements. See Oct. 24, 2001 Order at 6.

In considering the constitutionality of North Carolina's definition of "political committee," the Court noted that, under Section 163-278.6(14), an organization may qualify as a political committee if: (1) it makes expenditures or contributions to a political candidate; and (2) it qualifies as either a candidate-controlled organization, a political party, an organization created by a corporation, business entity, or union, or a group that has as its "major purpose" to support or oppose the nomination or election of one or more clearly-identified candidates.

This Court found Section 163-278.6(14) to be unconstitutional, on the basis that the definitions of "expenditure" and "major purpose" that were incorporated into the Statute's "political committee" definition were unconstitutionally broad. Specifically, the Court noted that Section 163-278.6(14) incorporated a definition of "expenditure," set forth at N.C. Gen. Stat. § 163-278. 14A(a)(2), which allowed a communication to be deemed regulable as "express advocacy" based on certain contextual factors. The Court noted that such a standard does not comply with the Supreme Court's requirement, in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976), that the regulation of so-called "express advocacy" extend only to communications that use "clear words that 'directly fit the term ['express advocacy'], such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," . . .", Virginia Society for Human Life

v. Federal Election Comm 'n, 263 F .3d 379, 392 (noting the Buckley standard for "express advocacy"). This Court concluded that, by incorporating into its "political committee" determination a definition of "expenditure" that impermissibly regulated issue advocacy, Section 163-278.6(14) was in violation of the First Amendment.

Defendants do not currently contest the Court's ruling with regards to the constitutionality of the "express advocacy" test under N.C. Gen. Stat. § 163-278.14A(a)(2). Nor do they seek reconsideration of the Court's ultimate conclusion that Section 163-278.6(14) was unconstitutional insofar as it incorporated such Section 163-278.14A(a)(2)'s overly-broad definition of "express advocacy." Instead, Defendants have moved the Court to amend its previous Order, on the basis that the Court's remedy was inappropriate. Specifically, Defendants argue that, instead of striking Section 163-278.6(14) down as unconstitutional in its entirety, the Court should sever the overly-broad definition of "expenditure" under Section 163-278.14A(a)(2), that rendered Section 163-278.6(14)'s definition of "political committee" constitutionally infirm.

The severability ofa state statute is determined by state law. See Leavitt v. Jane L., 518 U.S. 137, 139 (1996). Under North Carolina law, if a portion ofa state statute is violative of the Constitution or another federal law, the invalid portion may be stricken and the remaining portion given effect if: (1) the remaining portion is whole and complete in itself; and (2) the intent of the legislature was such that the statute would have

been enacted even without the stricken portion. See Stephenson v. Bartlett, 562 S.E.2d 377 (2002).

Upon consideration of the matter, this Court finds that, if the invalid "express advocacy" standard found in Section 163-278.14A(a)(2) is stricken, and thus not applied under Section 163- 278.6(14), the balance of Section 163-278.6(14) remains whole and complete. As the Court noted in its previous Order, Section 163-278.6(14) is unconstitutional, insofar as it incorporates Section 163-278.14A(a)(2)'s overly-broad "express advocacy" standard into its detennination of "expenditure," for purposes of both the initial "expenditure" requirement under the Statute, as well as the subsequent "major purpose" requirement (which itself may be determined based on the level of an entity's "expenditures"). See N.C. Gen. Stat. § 163-278.6(14) (2003).

However, as the Court has previously noted, N.C. Gen. Stat. § 278.14A does contain an alternative method for detennining what constitutes "express advocacy." Specifically, Section 278.14A(a)(I) requires that, to qualify as "express advocacy," done to "support or oppose" a clearly-identified candidate, a communication must "use phrases such as 'vote for', 'reelect', 'support', 'cast your ballot for', '(name of candidate) for (name of office)', '(name of candidate) in (year)', 'vote against', 'defeat', 'reject'", and so on. See N.C. Gen. Stat. § 278.14A(a)(1). Section 278.14A(a). By contrast to the infringing standard set forth in Section 278. 14A(a)(2), the standard in Subsection (a)(l) "mirrors the 'express advocacy' test . . . set forth in Buckley, [which] has since been vigorously

applied by the Fourth Circuit." Oct. 24, 2001 Order at 4. Therefore, by severing the unconstitutional "express advocacy" test set forth under Section 278.14A(a)(2), the Court is left with Section 178.14A(a)(I), an entirely independent, and constitutionally-sound standard by which to determine what constitutes "express advocacy."

Moreover, it appears that the legislature intended such severance to be employed in this case. At the time that it adopted Section 163-278.14A, and the "express advocacy" standards set forth therein, the North Carolina General Assembly provided that "the provisions of this [Campaign Reform Act of 1999] are severable. If any section, subsection, subdivision, sub- subdivision, phrase, or word of this act or of any statute that it amends is held invalid by a court . . . the invalidity does not affect any other portion . . . of this act that can be given effect without the invalid provision." Session Law 1999-453.

It is clear that Section 163-278. 14A(a)(I) can be given effect, without the invalid provision, Section 163-278.14A(a)(2). Moreover, absent the unconstitutional "express advocacy" standard set forth in Section 163-278. 14A(a)(2), the "political committee" definition set forth in Section 163-278.6(14) can also be given effect, without running afoul of First Amendment concerns.[1] Accordingly, while the Court

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[1] In spite of Plaintiffs' argument to the contrary, the rebuttable "major purpose" presumption contained in the

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latter part of Section 163-278.6(14) is not unconstitutionally vague or overbroad. The Court cannot accept Plaintiffs' proposition that an organization can have but ~ "major purpose," and that, by corollary, the only constitutional "major purpose" standard would require a finding that over 50% of an entity's disbursements were allocated toward express advocacy (or contributions). See Complaint ¶ 48. Such a requirement would, indeed, lead to questionable results. For instance, an entity with a $3 million budget, which expended as much as $1.4 million on an express advocacy campaign, would not qualify as a "political committee," despite the apparent fact that electioneering was at least ~ of its major purposes.

Instead, the Court finds that Section 163-278.6(14)'s presumption of political committee status, based on an entity's expenditures (defined only to include express advocacy) and contributions totaling over $3,000 in an election cycle, and open to rebuttal by a showing that such expenditures were not a major purpose of the organization, is not violative of the First Amendment. The standard represents a reasonable application of the Supreme Court's conclusion that an organization whose "independent spending [has] become so extensive that [its] major purpose may be regarded as campaign activity" may be classified as a "political committee," and, indeed, may be properly subject to the regulations attending such classification. See MCFL. 479 U.S. at 262 (reiterating the Buckley Court's holding with regards to the "major purpose" requirement). Thus, once North Carolina's "express advocacy" standard is conformed to Buckley, by limiting the scope of the term to the standard set forth in N.C. Gen. Stat. § 163- 274. 14A(a)(I), Section 163-278.6(14)'s "political committee" definition (including its "major purpose" component), conforms applicable precedent and does not run afoul of the First

finds that the "political committee" definition in Section 163-278.6(14) would ordinarily infringe Plaintiffs' rights under the First Amendment, insofar as it incorporates an improper definition of "express advocacy" (and, therefore, may be applied against organizations that engage solely in issue advocacy), the Court will not hold Section 163-278.6(14) facially unconstitutional. Instead, the Court will sever the constitutionally-infirm "express advocacy" standard contained in Section 163-278.14A(a)(2), and as it may be applied under Section 163-278.6(14). This Court concludes that, having excised the invalid portion of Section 163-278.14A, Section 163-278.6(14) (and, indeed, the balance of Section 163-278. 14A, namely, Section 163-278.14A(a)(I)) is severable and enforceable.

2. Plaintiffs' Motion to Alter or Amend Judgment

Plaintiffs have also moved to alter or amend the Court's previous judgment, on the basis that, with respect to N.C. Gen. Stat. §§ 163-278.12A and 163-278.39(a)(3), Plaintiffs' challenges were not, as the Court held in its October 24,2001 Order, rendered moot. Having reconsidered the issues, however, the Court finds that Plaintiffs' challenges to such statutes were, in fact, moot. There Court will therefore not disrupt its previous judgment in this regard.

2(a) Section 163-278.12A

Amendment.

Order filed August 8, 2002, E.D.N.C.

Plaintiffs recognize that Section 163-278.12A was previously held unconstitutional by the Fourth Circuit in Perry: v. Bartlett, 231 F.2d 155 (4th Cir. 2000), cert. denied. 121 S.Ct. 1229 (2001). Plaintiffs apparently contend that they nonetheless remain in danger of the State's continued enforcement of the Statute. However, Plaintiffs' contention reflects a misunderstanding of the Fourth Circuit's opinion in Perry.

A reading of the Court's opinion in Perry reveals that the Fourth Circuit not only held Section 12A unconstitutional, but that the Circuit Court "permanently enjoined [the State] from enforcing it." Perry, 231 F .3d at 162. The Fourth Circuit thus enjoined enforcement of Section 12A against any party, including Plaintiffs. Plaintiffs need no further relief in the matter, and the issue is clearly moot.

2(b). Section 163-278.39(a)(3)

With regards to N.C. Gen. Stat. § 1 63-278.39(a)(3), Plaintiffs claim that the State's repeal of the Statute did not render moot the issue of the constitutionality of the Statute. However, there is no evidence that the State of North Carolina will re-enact the offending Statute. Accordingly, because the Statute was repealed, there is no present controversy as to its validity. Repeal of Section I 63-278.39(a)(3) did, in fact, render moot Plaintiffs' challenge to the Statute. For this reason, Plaintiffs' Motion to Alter or Amend Judgment will be denied.

3. Defendants' Motion to Stay

Order filed August 8, 2002, E.D.N.C.

On November 1,2001, Defendants moved to stay this Court's prior Order, on the basis that the Order could be read to preclude enforcement of Section 163-278.6(14) in its entirety. However, having excised the offending "express advocacy" standard applied in Section 163- 278.6(14), the Court has held the balance of the "political committee" Statute to be valid and enforceable. Accordingly, Defendants' Motion to Stay is moot and will be denied.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Alter or Amend Judgment is hereby GRANTED. The Court's October 24,2001 Order is hereby amended to reflect that N.C. Gen. Stat. § 163-278.6(14) is only unconstitutional insofar as it incorporates the overly-broad "express advocacy" standard set forth under N.C. Gen. Stat. § 163-278.14A(a)(2). The Court's previous Order should further be amended to reflect that Section 163-278.14A(a)(2) is severable from the rest of Section 163-278.14A, and that, after such severance, Section 163-278.6(14) is valid and enforceable.

Plaintiffs' Motion to Alter or Amend Judgment is DENIED. Defendants' Motion to Stay Order is also DENIED as moot. Defendants' Motions to Amend Caption are GRANTED, and such changes are reflected in the caption of this Order. As to Plaintiffs' Motion for Attorneys' Fees, the Court notes that Defendants must file a Response to Plaintiffs' Motion within twenty days of entry of this Order, as required

Order filed August 8, 2002, E.D.N.C.

under this Court's November 20,2001 Order. The Court will rule on such Motion at the appropriate time.

SO ORDERED.

This 5th day of August, 2002.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE

Judgment filed August 8, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Civil Action No. 5:99-CV-798-BO(3)

NORTH CAROLINA RIGHT TO LIFE, INC., NORTH CAROLINA RIGHT TO LIFE POLITICAL ACTION COMMITTEE, and NORTH CAROLINA RIGHT TO LIFE COMMITTEE FUND FOR INDEPENDENT POLITICAL EXPENDITURES,

Plaintiffs,

v.

LARRY LEAKE, in his official capacity as Chairman of the North Carolina State Board of Elections; GENEVIEVE C. SIMS, in her official capacity as Secretary of the State Board of Elections; ROBERT B. CORDLE, in his official capacity as a Member of the State Board of Elections; LORRAINE G. SHINN, in her official capacity as a Member of the State Board of Elections; CHARLES WINFREE, in his official capacity as a Member of the State Board of Elections; ROBERT F. JOHNSON, in his official capacity as District Attorney for North Carolina Prosecutorial District 15-A; and ROY COOPER, in his official capacity as the North Carolina Attorney General,

Defendants.

JUDGMENT

No. 5:99-CV-798-BO(3)

Judgment filed August 8, 2002

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion to Alter or Amend Judgment is DENIED and Defendants' Motion to Alter or Amend Judgment is hereby GRANTED. The Court's October 24, 2001 Order is hereby amended to reflect that N.C. Gen. Stat. § 163- 278.6(14) is only unconstitutional insofar as it incorporates the overly-broad "express advocacy" standard set forth under N.C. Gen. Stat. § 1 63-278. 14A(a)(2). The Court's previous Order should further be amended to reflect that Section 163-278.14A(a)(2) is severable from the rest of Section 163-278.14A, and that, after such severance, Section 163-278.6(14) is valid and enforceable.

This Judgment Filed and Entered on August 8. 2002. and Copies To:

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Judgment filed August 8, 2002

August 8, 2002 DAVID W. DANIEL, CLERK

/s/

(By) Deputy Clerk

United States Constitution - Amendment I

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

N.C. GEN STAT. 163-278.6(14) (2003)

GENERAL STATUTES OF NORTH CAROLINA

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N.C. GEN. STAT. § 163-278.6 (2003)

§ 163-278.6. Definitions

(14) The term "political committee" means a combination of two or more individuals, such as any person, committee, association, organization, or other entity that makes, or accepts anything of value to make, contributions or expenditures and has one or more of the following characteristics:

a. Is controlled by a candidate;

b. Is a political party or executive committee of a political party or is controlled by a political party or executive committee of a political party;

c. Is created by a corporation, business entity, insurance company, labor union, or professional association pursuant to G.S. 163-278.19(b); or

d. Has as a major purpose to support or oppose the nomination or election of one or more clearly identified candidates.

Supporting or opposing the election of clearly identified candidates includes supporting or opposing the candidates of a clearly identified political party.

An entity is rebuttably presumed to have as a major purpose to support or oppose the nomination or election of

N.C. GEN STAT. 163-278.6(14) (2003)

one or more clearly identified candidates if it contributes or expends or both contributes and expends during an election cycle more than three thousand dollars ($3,000). The presumption may be rebutted by showing that the contributions and expenditures giving rise to the presumption were not a major part of activities of the organization during the election cycle. Contributions to referendum committees and expenditures to support or oppose ballot issues shall not be facts considered to give rise to the presumption or otherwise be used in determining whether an entity is a political committee.

If the entity qualifies as a "political committee" under sub-subdivision a., b., c., or d. of this subdivision, it continues to be a political committee if it receives contributions or makes expenditures or maintains assets or liabilities. A political committee ceases to exist when it winds up its operations, disposes of its assets, and files its final report.

N.C. GEN STAT. 163-278.13 (2003)

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N.C. GEN. STAT. § 163-278.13 (2003)

§ 163-278.13. Limitation on contributions

(a) No individual, political committee, or other entity shall contribute to any candidate or other political committee any money or make any other contribution in any election in excess of four thousand dollars ($4,000) for that election.

(b) No candidate or political committee shall accept or solicit any contribution from any individual, other political committee, or other entity of any money or any other contribution in any election in excess of four thousand dollars ($4,000) for that election.

(c) Notwithstanding the provisions of subsections (a) and (b) of this section, it shall be lawful for a candidate or a candidate's spouse, parents, brothers and sisters to make a contribution to the candidate or to the candidate's treasurer of any amount of money or to make any other contribution in any election in excess of four thousand dollars ($4,000) for that election.

(d) For the purposes of this section, the term "an election" means any primary, second primary, or general election in which the candidate or political committee may be involved, without regard to whether the candidate is opposed or unopposed in the election, except that where a candidate is not

N.C. GEN STAT. 163-278.13 (2003)

on the ballot in a second primary, that second primary is not "an election" with respect to that candidate.

(e) This section shall not apply to any national, State, district or county executive committee of any political party. For the purposes of this section only, the term "political party" means only those political parties officially recognized under G.S. 163-96.

(e1) No referendum committee which received any contribution from a corporation, labor union, insurance company, business entity, or professional association may make any contribution to another referendum committee, to a candidate or to a political committee.

(e2) In order to make meaningful the provisions of Article 22D of this Chapter, the following provisions shall apply with respect to candidates for justice of the Supreme Court and judge of the Court of Appeals:

(1) No candidate shall accept, and no contributor shall make to that candidate, a contribution in any election exceeding one thousand dollars ($1,000) except as provided for elsewhere in this subsection.

(2) A candidate may accept, and a family contributor may make to that candidate, a contribution not exceeding two thousand dollars ($2,000) in an election if the contributor is that candidate's parent, child, brother, or sister.

(3) No candidate shall accept, and no contributor shall make to that candidate, a contribution during the period beginning 21 days before the day of the general election and ending the day after the general election. This subdivision applies with

N.C. GEN STAT. 163-278.13 (2003)

> respect to a candidate opposed in the general election by a certified candidate as defined in Article 22D of this Chapter who has not received the maximum rescue funds available under G.S. 163-278.67. The recipient of a contribution that apparently violates this subdivision has three days to return the contribution or file a detailed statement with the State Board of Elections explaining why the contribution does not violate this subdivision.

As used in this subsection, "candidate" is also a political committee authorized by the candidate for that candidate's election. Nothing in this subsection shall prohibit a candidate or the spouse of that candidate from making a contribution or loan secured entirely by that individual's assets to that candidate's own campaign.

(f) Any individual, candidate, political committee, referendum committee, or other entity that violates the provisions of this section is guilty of a Class 2 misdemeanor.

N.C. GEN. STAT. 163-278.14A (2003)

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N.C. GEN. STAT. § 163-278.14A (2003)

§ 163-278.14A. Evidence that communications are "to support or oppose the nomination or election of one or more clearly identified candidates."

(a) Either of the following shall be means, but not necessarily the exclusive or conclusive means, of proving that an individual or other entity acted "to support or oppose the nomination or election of one or more clearly identified candidates":

(1) Evidence of financial sponsorship of communications to the general public that use phrases such as "vote for", 'reelect", "support", "cast your ballot for", "(name of candidate) for (name of office)", "(name of candidate) in (year)", "vote against', "defeat", "reject", "vote pro-(policy position)" or "vote anti-(policy position)" accompanied by a list of candidates clearly labeled "pro-(policy position)" or "anti-(policy position)", or communications of campaign words or slogans, such as posters, bumper stickers, advertisements, etc., which say "(name of candidate)'s the One",

N.C. GEN. STAT. 163-278.14A (2003)

"(name of candidate) '98", "(name of candidate)!", or the names of two candidates joined by a hyphen or slash.

(2) Evidence of financial sponsorship of communications whose essential nature expresses electoral advocacy to the general public and goes beyond a mere discussion of public issues in that they direct voters to take some action to nominate, elect, or defeat a candidate in an election. If the course of action is unclear, contextual factors such as the language of the communication as a whole, the timing of the communication in relation to events of the day, the distribution of the communication to a significant number of registered voters for that candidate's election, and the cost of the communication may be considered in determining whether the action urged could only be interpreted by a reasonable person as advocating the nomination, election, or defeat of that candidate in that election.

(b) Notwithstanding the provisions of subsection (a) of this section, a communication shall not be subject to regulation as a contribution or expenditure under this Article if it:

(1) Appears in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, or magazine, unless those facilities are owned or controlled by any political party, or political committee;

N.C. GEN. STAT. 163-278.14A (2003)

(2) Is distributed by a corporation solely to its stockholders and employees; or

(3) Is distributed by any organization, association, or labor union solely to its members or to subscribers or recipients of its regular publications, or is made available to individuals in response to their request, including through the Internet.

Deposition Exhibit 86

Attachment 2A

Interrogatory #2

Years		NCRL and NCRLEF	NCRLPAC	NCRL.FIPE
1996	President	Barbara S. Holt	Barbara S. Holt	
	Vice-President	Kean Degnon		
	Treasurer	Ron Frerking	William Pearson	
	Secretary	David G. 0' Steen	David G. O' Steen	
	National Director	Emma N. O'Steen		
	PAC Director	David G. 0' Steen	David G. O' Steen	
1997	President	Barbara S. Holt	Barbara S. Holt	
	Vice-President	Kean Degnon		
	Treasurer	Don Daugherty	William Pearson	
	Secretary	David G- 0' Steen	David G. 0' Steen	
	National Director	Emma N. 0' Steen		
	PAC Director	David G. 0' Steen	David G. 0' Steen	

Deposition Exhibit 86

1998	President	Barbara S. Holt	Barbara S. Holt	
	Vice-President	Kean Degnan		
	Treasurer	Don Daugherty	William Pearson	
	Secretary	David G. 0' Steen	David G. 0' Steen	
	National Director	Emma N. 0' Steen		
	PAC Director	David G. O' Steen	David G. O' Steen	
1999	President	Barbara S. Holt	Barbara S. Holt	Barbara S. Holt
	Vice-President	Loretta Thompson		
	Treasurer	Don Daugherty	William Pearson	Don Daugherty
	Secretary	DavId G. O'Steen	David G. O'Steen	David G. O'Steen
	National Director	Emma N. O'Steen		
	PAC Director	David G. O'Steen	David G. O'Steen	David G. O'Steen
2000	President	Barbara S. Holt	Barbara S. Holt	Barbara S. Holt
	Vice-President	Loretta Thompson		
	Treasurer	Don Daugherty	Witliam Pearson	Don Daugherty
	Secretary	David G. O'Steen	David G. O'Steen	David G. O'Steen
	National Director	Emma N. O'Steen		
	PAC Director	David G. O'Steen	David G. O'Steen	David G. O'Steen
			Don Daugheny	Don Daugherty

Deposition Exhibit 86

(2)

No. 03-910

Supreme Court, U.S.
FILED
MAR 2 3 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LARRY LEAKE, in His Official Capacity as Chairman of the North Carolina State Board of Elections, *et al.*,

Petitioners,

v.

NORTH CAROLINA RIGHT TO LIFE, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief in Opposition to Petition for Writ of Certiorari

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Questions Presented

I. Whether a statute is void for vagueness when it regulates the financing of communications based upon their "essential nature" and looks to a series of contextual factors to determine how the communication would be interpreted by a reasonable person.

II. Whether the Constitution permits an association to be presumed subject to comprehensive political committee regulations based solely upon a $3,000 expenditure.

III. Whether the Constitution permits a state to limit contributions to independent expenditure committees that do not contribute to candidate.

Corporate Disclosure Statement

Respondent North Carolina Right to Life, Inc. is a parent company of Respondents North Carolina Right to Life Political Action Committee and North Carolina Right to Life Committee Fund for Independent Political Expenditures. There are no other parent corporations for any respondent, and no publicly held company owns ten percent or more of the stock of any of the respondents. Rule 29.6.

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Argument

The state implicitly concedes that this case does not merit full review by this Court, and instead asks only that the matter be remanded to the lower court for further consideration in light of this Court's recent decision in *McConnell v. FEC*, 124 S. Ct. 619 (2003). Such a procedure is one that "should be exercised sparingly." *Lawrence v. Chater*, 516 U.S. 163, 173 (1996). It is potentially appropriate only when

> intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.

Id. at 167.

No such probability exists here because the Fourth Circuit's analysis and holdings are fully consistent with those announced by this Court in *McConnell*. There were three basic holdings in the lower court on which the state now seeks review: (1) The context prong of North Carolina's expenditure definition failed to provide a bright line "unconstitutionally shifts the determination of what is 'express advocacy' away from the words in and of themselves to the unpredictability of audience interpretation" *North Carolina Right to Life, Inc. v. Leake*, 344 F.3d 418, 428 (4th Cir. 2003). (2) The state's $3,000 major purpose presumption was substantially

overbroad and invalid because it is "based entirely on a monetary standard completely untethered from the other factors identified by the Supreme Court in determining major purposes." *Id.* at 433. And (3) That a limit on the size of contributions to independent expenditure committees ("IEPACs") was unconstitutional because "the corruptive influence of contributions for independent expenditures is more novel and implausible than that posed by contributions to candidates" and that the state had "failed to proffer sufficiently convincing evidence . . . that there is a danger of corruption due to the presence of unchecked contributions to IEPACs." *Id.* at 434.

None of these issues was addressed in *McConnell*. Although several principles were discussed in both cases, these had been well established by prior cases and *McConnell* simply re-affirmed the authorities relied upon by the Fourth Circuit here. For example, the express advocacy test was discussed in both cases, with the Fourth Circuit striking down North Carolina's laws based upon vagueness concerns described by this Court in *Buckley v. Valeo*, 424 U.S. 1, 43 (1976). *NCRL*, 344 F.3d at 427. While this Court upheld the statute it analyzed, it was able to do so only because the clearly delineated federal statute "raises none of the vagueness concerns that drove our analysis in *Buckley*." *McConnell*, 124 S. Ct. at 689.

The *McConnell* decision also re-affirmed several of the principles that underlay the Fourth Circuit's decision on the IEPAC issue: the level of scrutiny for contributions limits, the lack of corruptive potential from independent expenditures, and the connection between the plausibility of a legislative judgment and

the state's evidentiary burden to support it. *Compare McConnell*, 124 S. Ct. at 655-656, 705, 711 *with NCRL*, 344 F.3d at 433-434.

With regards to the major purpose presumption issue, there is no overlap even of underlying principles. Although the state claims the *McConnell* decision enhances the deference to which the legislative decision is due, Cert. Petition at 13, 20, the section of the opinion to which they cite actually says nothing about deferring to legislative judgment. *See McConnell*, 124 S. Ct. at 690-693. Although this Court did defer to Congressional expertise with regards to matters such as how the close relationship between political parties and their candidates might be used to influence elections, *McConnell*, 124 S. Ct. at 673, there is nothing to recommend deference to the legislature's judgment concerning the operations and purposes of independent citizens' groups at issue here. Simply because this Court deferred to a co-equal branch of the federal government on a particular legislative finding, based on a massive evidentiary record, does not indicate a *carte blanche* deference to any and all unrelated campaign finance regulation that a state legislature may enact.

Because *McConnell* does not contradict the Fourth Circuit's holdings or undermine its analysis, there is no basis to conclude that a re-evaluation of this case would alter its outcome, and therefore is no basis on which to vacate and remand. *See Lawrence*, 516 U.S. at 167. Since the existing decision is also fully consistent with prior decisions of this Court and does not conflict with the decisions of any other federal circuit, the state's petition should be denied.

I. The Context Prong of N.C. Gen Stat. § 163-278.14A Is Void For Vagueness.

The content definition at issue here, N.C. Gen. Stat. § 163-278.14A(a)(2), is unconstitutionally vague, and is therefore unaffected by this Court's recent upholding of the federal "electioneering communication" provision that this Court said "raises none of the vagueness concerns that drove our analysis in *Buckley*." *McConnell v. FEC*, 124 S. Ct. 619, 689 (2003). Although the Fourth Circuit found the statute at issue here to be unconstitutional on both vagueness and overbreadth grounds for violating *Buckley*'s express advocacy test, its analysis focused heavily on vagueness concerns necessitating a "bright-line standard." *NCRL*, 344 F.3d at 424-428. Since either vagueness or overbreadth would be sufficient grounds for striking a restriction on First Amendment rights, this statute's vagueness renders any impact of *McConnell*'s overbreadth analysis irrelevant.

A. Vagueness Is Not Permitted in Content-Based Regulation of Political Speech.

In both *Buckley* and *McConnell*, this Court recognized that definitions triggering campaign finance restrictions must "avoid problems of vagueness and overbreadth." *McConnell*, 124 S. Ct. at 688. In *Buckley*, the principal problem was vagueness, which cannot be tolerated in restrictions of First Amendment activity because "vague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to steer far wider of the unlawful zone.'"

Buckley, 424 U.S. at 41 n. 48 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)). Hence, a statute is void for vagueness if it fails to define the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In addressing the constitutional use of such phrases as "relative to," *Buckley*, 424 U.S. at 41, "advocating the election or defeat," *id.* at 42, "for the purpose of . . . influencing," *id.* at 78, or "in connection with any election," *MCFL*, 479 U.S. at 248-249, this Court found that the constitutional deficiencies of vagueness "can be avoided only by reading [the statute] as limited to communications that include explicit words of advocacy." *Buckley*, 424 U.S. at 43, 80; *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

In *McConnell*, however, vagueness was not an issue because the statutory reach was defined by an elaborate but clear series of standards which raised only questions of overbreadth. *McConnell*, 124 S. Ct. at 688. This new decision thereby approved the federal statute as a constitutionally acceptable alternative to *Buckley*'s express advocacy test, but did not alter *Buckley*'s approach to vagueness. As the Sixth Circuit has since explained, *McConnell* "left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth." *Anderson v. Spear*, 356 F.3d 651, 2004 U.S. App. LEXIS 586 at 36 (6th Cir. 2004). Together, *Buckley* and *McConnell* provide state's with two choices for the regulation of campaign finance expenditures: they can

either use the express advocacy test, or they can utilize a somewhat broader content delineation if the excessive scope is narrowed to "the functional equivalent of express advocacy" through clearly defined requirements for timing, media, and audience. *McConnell*, 124 S. Ct. at 696.

B. North Carolina's Context Prong Is Unconstitutionally Vague

Here, North Carolina's statutory definition, § 163-278.14A(a) attempts what may be called a *Buckley*-plus approach as its first subsection codifies *Buckley*'s express advocacy test by providing a comprehensive list of the types of campaign speech that plainly and necessarily expressly advocate the election or defeat of a candidate. Plaintiffs do not challenge this first subsection, but they do challenge to statute's context prong, subsection(2), which seeks to regulate additional communications according to how the general public may perceive their "essential nature." This determination, in turn, is to be made by weighing a series of contextual factors according to a "reasonable person" standard of interpretation. Essentially, the definition erases the bright line of the express advocacy test by reaching beyond it to encompass whatever communications can be viewed as triggering the state's interest.

This approach differs dramatically from the "electioneering communication" upheld in *McConnell*. In that case, the federal statute utilized a clear content delineation which was then narrowed by a series of clearly-defined contextual limitations: the provision would apply only to "(1) a broadcast (2) clearly

identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identifiable audience of at least 50,000 viewers or listeners." *McConnell*, 124 S. Ct. at 689. As this Court noted, "[t]hese components are both easily understood and objectively determinable," so that "the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite here." *Id.* Basically, the statute sets up a series of clearly-defined "safe harbors" within which communications can be made without threat of regulation.

In contrast, North Carolina's statute provides little safety to anyone wishing to discuss contemporary political issues. Its reliance on how a communication would be perceived by the general public or by a reasonable person ignores this Court's warning that such criteria "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion . . . . It compels the speaker to hedge and trim." *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

Although the statute in question here looks at many of the same types of factors as the federal "electioneering communication," it utterly fails to define when or how these factors might apply. For example, the federal statute sets a specific time frame for its application: 60 days before a general election or 30 days before a primary. *McConnell*, 124 S. Ct. at 687. A speaker can avoid regulation by simply timing his ad to run 61 days before the election. In contrast, North

Carolina's statute provides no concrete time limit, but looks broadly to "the timing of the communication in relation to events of the day." Though this may include proximity to an election, there is nothing in this statute to prevent enforcement against communications made 61, 120, or even 500 days before an election, and also nothing to require enforcement against communications made a week before election day. Perhaps a mailing that touts a candidate's tax proposals will be viewed as electoral in nature if sent when the candidate kicks off his campaign a year before the election, but not electoral if sent a few weeks before the election while the proposal is pending in the legislature. Or perhaps the proximity to the election will control so that only the second mailing would be viewed as electoral. Or perhaps both will be electoral, or neither of them–a speaker can only guess.

Similarly, a communication that reaches fewer than 50,000 persons in the candidate's district is off limits to the federal regulation, *McConnell*, 124 S. Ct. at 687, but North Carolina's context prong balances whether it is distributed to "a significant number of registered voters." Is 20,000 voters a significant number? Is 1,000? 100? Does it matter if the communication is also distributed outside the district? The statute again does not answer these critical questions. Moreover, none of these factors are mandatory but are simply among those which "may be considered," so even communications with insignificant distribution to the candidate's constituents might still trigger regulation based upon other factors.

The potential for discriminatory enforcement of such a scheme is obvious. A partisan prosecutor could easily focus on factors that would justify enforcement actions against his opponents while exempting friendly ads from prosecution. Perhaps a "Smith is bad for farmers" mailing will be deemed electoral in nature while "Smith is good for business" radio ads will be allowed because they ran a week farther from the election, or because they reached fewer of Smith's constituents.

C. Partial Severance of the Context Prong Does Not Cure Its Vagueness.

Nor do these problems permit the retention of the first sentence of § 163-278.14A(a)(2), as suggested by Judge Michael in partial dissent. *See NCRL*, 344 F.3d at 435-437 (Michael, J., concurring in part and dissenting in part). Although this approach would take out some of the more vague aspects of this statute, this first sentence still raises ambiguous questions of when a communication's "essential nature expresses electoral advocacy to the general public" and what is meant by "directs voters to take some action to nominate, elect, or defeat a candidate in an election."

The problem is similar to one already addressed by this Court in rejecting an "advocating the election or defeat" test. *Buckley*, 424 U.S. at 42. Because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application" this Court held that sufficient clarity in this definition could only be achieved if the statute's scope were "limited to communications that include explicit words of

advocacy." *Id.* at 43. Here as well, many communications that do not contain explicit words of advocacy will be susceptible to interpretation either as an issue discussion or as candidate advocacy. For example, does a plea to "stop Governor Smith from raising taxes" advocate that the hearers vote against Governor Smith, join an anti-tax rally, or call their legislators?

This first sentence of subsection (2) cannot be saved by a narrowing construction because the only one available, i.e., explicit words of advocacy, is already codified in subsection (1). This first provision provides an exhaustive list of phrases that may constitute explicit words of advocacy. § 163-278.14A(a)(1). It incorporates all of the examples provided by this Court in *Buckley*, 424 U.S. at 44 n.52, plus the two-step "vote pro-life, Smith is pro-life" advocacy described in *MCFL*, 479 U.S. at 249. It then adds a third category of campaign slogans such as "Smith's the One." Notably, this list is prefaced by "phrases such as," so that other forms of explicit advocacy like "Smith for North Carolina" or "Send Smith packing on November 8" would be covered by this section even though they are not specifically listed.

Because express advocacy is already regulated by subsection (1), the only communications that might be subjected to regulation only by subsection (2) are necessarily those that do not contain explicit words of advocacy and whose meanings are therefore subject to uncertain interpretation. Hence, any effort to construe this section in a way that avoids vagueness would necessarily render it redundant with subsection (1).

In conclusion, North Carolina's current attempt to reach beyond explicit words of advocacy sets an ambiguous standard that must be struck down as unconstitutionally vague. If the state legislature wishes to regulate communications that are "the functional equivalent of express advocacy," this Court's recent decision provides a roadmap showing how narrow and well-defined boundaries can be used to achieve this purpose. *McConnell*, 124 S. Ct. at 696. However, its current attempt does not follow this approach and the lower court's decision to strike it down should be allowed to stand.

II. The Fourth Circuit Properly Held That North Carolina May Not Presume Political Committee Regulations Based On A Flat Monetary Standard Without Analysis of the Organization's Overall Purpose.

Plaintiffs also challenged a portion of North Carolina's political committee definition, N.C. Gen. Stat. § 163-278.6(14), under which associations making $3,000 in expenditures or contributions are presumed to have the major purpose of supporting or opposing candidates, and are thereby subjected to comprehensive organizational and reporting requirements as a political committee. The Fourth Circuit properly struck down this presumption because it is "based entirely on a monetary standard completely untethered from the other factors identified by the Supreme Court in determining major purposes." *NCRL*, 344 F.3d at 433.

A. Only Organizations Whose Major Purpose Is Candidate Advocacy May Be Subjected To Comprehensive Organization-Wide Regulation.

The major purpose test plays an important role in campaign finance law because it allows comprehensive regulation of organizations that exist to promote candidates and whose entire operations are therefore inherently political, while protecting organizations that exist principally for other purposes and which can therefore be regulated only to the extent of their electoral advocacy. This test was first announced in *Buckley*, when this Court allowed the federal government to compel disclosure of all expenditures by political committees whose "major purpose . . . is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79. Regardless of the content of specific communications, all of such an organization's expenditures "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Buckley*, 424 U.S. at 79. In contrast, expenditures by other groups could be regulated only with regard to the specific "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 79-80.

This distinction between expenditure-specific and organization-wide regulations was again illustrated in *MCFL*, 479 U.S. 238, which involved a non-profit educational organization whose "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." Because of its electoral activities, it was

found to be subject to requirements that it disclose the amounts it spent on independent expenditures and the amount contributed for that purpose. *Id.* at 262. This Court also noted that should "independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262. In that event, "it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns." *Id.* at 263.

Based upon these precedents, the Fourth Circuit properly concluded that a constitutionally acceptable standard for political committee-type regulation should look to "an entity's stated purpose, which is typically reflected in its articles of incorporation, and the extent of an entity's activities and funding devoted to pure issue advocacy versus electoral advocacy." *NCRL*, 344 F.3d at 430. It also noted that this Court in *MCFL* had considered the organization's "legislative and public demonstration activities, how it raised its finances, and its publications" before determining its major purpose. *NCRL*, 344 F.3d at 430 n.4.

B. North Carolina's Political Committee Definition Violates the Major Purpose Test by Imposing Organization-Wide Regulations Without Reference to the Organization's Actual Purposes.

Like the federal schemes reviewed in *Buckley* and *MCFL*, North Carolina's statutes also impose comprehensive organization-based burdens on organizations deemed to be political committees. As

the court below summarized the state's regulations, "[a] political committee is required to appoint a treasurer, file a statement of organization, maintain detailed accounts of all contributions received and expenditures made, and file periodic statements with the State Board of Elections." *NCRL*, 344 F.3d at 423-424. Political committee status also triggers limits on the size of contributions that an organization may accept. § 163-278.13(b).

Unfortunately, these organization-wide burdens are not matched to organizational criteria for their imposition, but can instead be triggered by the making of a single expenditure costing a tiny fraction of the organization's resources. Under § 163-278.6(14), any entity is "rebuttably presumed to have as a major purpose to support or oppose the nomination or election of . . . candidates if it contributes or expends . . . more than three thousand dollars." As the Fourth Circuit properly explained, this standard, "is based on an arbitrary level of spending that bears no relation to the idiosyncracies of the entity." *NCRL*, 344 F.3d at 430.

Although the presumption is rebuttable, and the state claims to retain the burden of proof, a plurality of this Court made clear last term that such a presumption violates the First Amendment when used to blur a constitutionally-mandated distinction because it "permits a jury to convict in every [] case in which defendants exercise their constitutional right not to put on a defense." *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 1550 (2003). At minimum, such a presumption "makes it more likely" that the offense will be established "regardless of the particular facts of the case." *Id.*

This Court has also struck down similar presumptions because they subjected persons exercising First Amendment rights to potential litigation in which they would "bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder." *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988). Such a scheme, "must necessarily chill speech in direct contravention of the First Amendment's dictates." *Id.*

Such concerns are certainly applicable here where the presumption allows the prosecution to establish an organization's major purpose without actually examining the organization's purposes. Rather than determining an organization's major purpose by comparing its electoral activities with its overall activities, this presumption looks only at the electoral activity and forces the organization to prove that they "were not a major part of activities of the organization during the election cycle." § 163-278.6(14).

C. This Definition Is also Unconstitutionally Vague Because It is Not Based on an Organization's Principal Purpose.

Additionally, this rebuttal provision also raises serious vagueness problems. While this Court has always spoken of "*the* major purpose," *Buckley*, 424 U.S. at 79 (emphasis added), or a groups' "primary objective," *MCFL*, 479 U.S. at 263, North Carolina's statute speaks of "*a* major purpose" and provides for showing that electoral activities were not "*a* major part". The former descriptions look at the organization's foremost or principal objective while the

latter suggests only significance. As the state explains in its current petition, the statute deliberately avoids providing a concrete standard for determining what is or is not a major purpose of an organization. Cert. Petition at 17-19. Even if an organization were to prove that its $3,001 electoral expenditure was dwarfed by the $10 million it spent on educational ads, there is nothing in this statute to preclude a finding that the $3,001 nonetheless comprised "a major part" of its activities. Indeed, such a finding would logically follow from the statute's focus on the potential impact on campaigns rather than the overall character of the speaking entity. See Cert. Petition at 14-15.

Such ambiguity fails to provide potential speakers with security to speak without fear of being subjected to comprehensive and restrictive regulations. The only safe means of avoiding potential enforcement is by limiting expenditures and contributions to less than $3,000. As discussed in Section I, *supra*, such ambiguity renders the statute unconstitutionally vague. *See Buckley*, 424 U.S. at 41.

D. A $3,000 Threshold Is Too Low and Would Ensnare Even the Organization Found Not to Be a Political Committee in *MCFL*.

Finally, even if an organization's major purpose could be measured by some level of flat monetary threshold, such a threshold would need to be far higher than the $3,000 set by North Carolina. In *MCFL* the organization at issue spent $9,812.76 to print and distribute an express advocacy communication, yet it was "undisputed on this record" that the organization

in question did not have "the major purpose of . . . the nomination or election of a candidate." *MCFL*, 479 U.S. at 244, 249, 252 n.6. Of course, the impact of such spending was far greater when it was made in 1978 that it would be now-back then it purchased the printing of over 100,000 copies of a newsletter and postage costs to mail 56,000 of them. *Id.* at 243-44, 249. Obviously, a presumption of major purpose cannot be supported by a mere $3,000 expenditure.

Because the Fourth Circuit properly followed the precedence of this Court, and does not conflict with the case law of any federal circuit, there is no need for this review by this Court.

III. The Fourth Circuit Properly Found That North Carolina Lacks Justification to Limit Contributions to Independent Expenditure Committees that Do Not Contribute to Candidates.

Both the District Court and the Fourth Circuit found that the state lacked justification for limiting the size of contributions made to independent expenditure committees ("IEPACs") because the compelling interest in combating corruption was insufficiently supported by limits on contributions that could not flow to a candidate. There is no need for Supreme Court intervention on this issue because the Fourth Circuit followed the well-established analysis that this Court has consistently applied to contribution limits, under which such limits "require less compelling justification than restrictions on independent spending" and can therefore survive "if the Government demonstrates that contribution regulation is 'closely drawn' to match

a 'sufficiently important interest.'" *NCRL*, 344 F.3d at 433 (quoting *Shrink PAC*, 528 U.S. at 387-88 (quoting *Buckley*, 424 U.S. at 25)). This standard has since been re-affirmed by this Court. *McConnell*, 124 S. Ct. at 655-656, 711.

A. Because IEPACs Do Not Contribute to Candidates, the State Lacks Justification for Limiting Contributions to Such Entities.

McConnell also re-affirmed the basis for distinguishing contributions to IEPACs from contributions that may ultimately flow to candidates,

> independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

Id. at 705 (quoting *Buckley*, 424 U.S. at 47). The Fourth Circuit used a segment of this precise quote as the foundation of its distinction. *See NCRL*, 344 F.3d at 433-434 (quoting *Buckley*, 424 U.S. at 47).

Because of the diminished potential for corruption when moneys are spent independently by third parties, the anti-corruption rationale for contribution limits evaporates where the money never reaches the candidate. Hence, when this Court upheld limits on contributions to multi-candidate PACs, Justice Blackmun emphasized that the result would be different if a limit "were applied to contributions to a political committee established for the purpose of making independent expenditures." *California Medical Association v. FEC*, 453 U.S. 182, 203 (1981) (Blackmun, J., concurring). As he explained the distinction, "[m]ulticandidate political committees are . . . essentially conduits for contributions to candidates, and as such . . . pose a perceived threat of actual or potential corruption. In contrast, contributions to a committee that makes only independent expenditures pose no such threat." *Id.* at 203.

Although no majority decision of this Court has directly addressed the constitutionality of contributions to IEPACs, it has struck down limits on contributions to ballot measure committees because they lacked the anti-corruption justification that supported limitations on contributions to candidates. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981). It has also found that there is a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *FEC v. National Conservative Political Action Committee*, 470 U.S. 499, 497 (1985). This Court has also recognized that contributions to independent speakers are even less dangerous than independent speech itself: "an

independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same . . . independent expenditure made directly by that donor." *Colorado Republican Federal Election Campaign Committee v. FEC*, 518 U.S. 604, 617 (1996). Since these contributions are therefore less threatening than an activity that this Court has recognized as posing too little threat of corruption to support limitation, *e.g. McConnell*, 124 S. Ct. at 705, the Fourth Circuit was undoubtably correct in concluding that "the corruptive influence of contributions for independent expenditures is more novel and implausible than that posed by contributions to candidates." *NCRL*, 344 F.3d at 434.

Moreover, allowing limits on contributions to IEPACs would create an illogical discrimination against those who wish to associate with others to fund independent expenditures through a committee rather than as individuals. This Court has recognized the unconstitutionality of such a scheme in a similar context because "[t]o place . . . any limit on individuals wishing to band together . . . while placing none on individuals acting alone, is clearly a restraint on the right of association," which "cannot be allowed to hobble the collective expressions of a group." *Citizens Against Rent Control*, 454 U.S. at 296. Hence, there can be no basis for prohibiting persons from pooling $4,001 with others to enable a political committee to run ads while allowing the individuals each to spend millions of dollars to run the same ad.

B. Political Committees Lack the Close Relationship to Candidates that Justified Regulation of Political Parties and Their Candidates in *McConnell*.

The state's petition ignores this Court's repeated decisions finding limitations on independent expenditures to be unsupported by the state's anti-corruption interest, and instead seeks "considerable deference to the legislative effort" to prevent circumvention of other limitations, citing as an example *McConnell*'s upholding of restrictions on state candidates who run ads supporting or opposing federal candidates. Cert. Petition at 21.

But the corruptive potential of state candidates who promote federal candidates is easily distinguished from that of unaffiliated IEPACs like NCRL-FIPE. First of all, the federal restrictions on state candidates was predicated and justified because of the close relationship between a political party and its candidates. *McConnell*, 124 S. Ct. at 684. Such parties and candidates "enjoy a special relationship and unity of interest" which places parties "in a unique position . . . to serve as 'agents for spending on behalf of those who seek to produce obligated officeholders.'" *Id.* at 661 (quoting *Colorado II*, 533 U.S. at 452). This Court sharply distinguished the "real-world differences between political parties and interest groups," explaining that "[i]nterest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses." *Id.* at 687. In contrast, "[p]olitical parties have influence and power in the legislature that vastly

exceeds that of any interest group. It is hardly surprising . . . that parties in turn have special access to and relationships with federal officeholders." *Id.* There is a good deal of plausibility to the scenario that a political party with close influence over both federal and state candidates could facilitate circumvention of the federal candidate's contribution limit by funneling funds to a state candidate who would use them to finance an ad campaign to aid his partisan compatriot. Of course, the close relationship between party and candidate also diminishes the risk of counterproductive ads and increases the likelihood that the expenditure will be welcomed and rewarded by the candidate.

C. The State Has Not Shown Any Realistic Threat Of Corruption that May Be Reduced By Limiting Contributions to IEPACs

There are also glaring weaknesses in the state's evidentiary support for its claims, which consists of a single episode described in deposition testimony, "an instance in which an organization known as Farmers for Fairness threatened . . . that it would run advertisements against certain vulnerable legislators in retaliation for votes against the hog industry." Cert. Petition at 21-22. Notably, the deponent was not a member of the legislature and there is nothing to suggest that the legislature enacted the challenged statute to address the concerns he raises. In fact, it is doubtful that the challenged limit would even have been applicable–Farmers for Fairness established in prior litigation that it was not a political committee and did not make regulable expenditures. *See Perry v.*

Bartlett, 231 F.3d 155 (4th Cir. 2000). If anything, this example serves as confirmation of this Court's warning that limitations on expenditures "could not be justified as a means of avoiding circumvention of contribution limits" where "its restrictions could easily be evaded." *McConnell*, 124 S. Ct. at 702-703.

The state's example also fails to show any triggering of the state's anti-corruption interest. This interest encompasses not only *quid pro quo* exchanges of money for favors, but also "extend[s] to the broader threat from politicians too compliant with the wishes of large contributors." *Id.* at 660 (quoting *Shrink PAC*, 528 U.S. at 389). Here, however, the Farmers group is not alleged to have offered rewards but to have threatened opposition. In other words, if the legislators acted against the interests of hog farmers, Farmers for Fairness would make communications in agricultural districts to let hog farmers know about it–a seemingly reasonable proposition. Such an arrangement necessarily excludes the money-for favors appearances that justify restraints on contributions that flow to candidates–the money is being spent against the wishes of the candidate in a position to grant favors. Moreover, such a rationale appears to be a thinly-veiled attempt to insulate incumbents, since they will normally be the ones in position to ward off the unwanted campaigns by acceding to the interest group's demands. As Justice Breyer has warned, "we should not defer" if a limit "insulates legislators from effective electoral challenge." *Shrink PAC*, 528 U.S. at 404 (Breyer, J., concurring).

Additionally, the state's claims regarding Farmers For Fairness are not based upon the size of the

contributions made to the organization, but to the size of the expenditures themselves. As such, this evidence does not support the constitutionality of limits on contributions to an IEPAC. At most, the anecdote suggests the type of supposed corruption from independent expenditures by political committees that this Court has already rejected because "the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger" of corruption. *NCPAC*, 470 U.S. at 498. Even if there were a danger of corruption from committees making large expenditures, limits on contribution to the committees would address the problem only by starving the committees of funding for their communications. Such a cure would only give rise to another disease since this Court has consistently maintained that contribution limits posed additional constitutional problems if set so low that they "prevent . . . political committees from amassing the resources necessary for effective advocacy." *McConnell*, 124 S. Ct. at 655-656 (quoting *Buckley*, 424 U.S. at 21). Since limiting contributions to IEPACs can only address expenditure-related corruption to the extent that they prevent such amassment of resources, they cannot be constitutionally used for this purpose.

In sum, the Fourth Circuit's decision is fully consistent with *McConnell*, and in many aspects is actually buttressed by the new decision. There is also no conflict with decisions of other circuits. Rather, the only other federal court to discuss the constitutionality of limiting contributions to an IEPAC reached a consistent result. *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934 (9th Cir. 2002).

Conclusion

This Court's recent decision in *McConnell* does not undermine the Fourth Circuit's decision in this case, but in many regards actually re-affirms the principles on which the lower court's decision was based. There is no "premise that the lower court would reject if given the opportunity for further consideration," and no "reasonable probability" that "such a redetermination may determine the ultimate outcome of the litigation," and hence no reason to vacate and remand the decision for re-consideration. *See Lawrence*, 516 U.S. at 167. The state's petition should therefore be denied.

Respectfully submitted,

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